

Fordham Urban Law Journal

Volume 39

Number 3 *Cooper-Walsh Colloquium - Big Problems,
Small Government: Assessing the Recent Financial
Crisis' Impact on Municipalities*

Article 8


February 2016

In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust

Sara Tam

Fordham University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Law and Society Commons](#), [Nonprofit Organizations Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Sara Tam, *In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust*, 39 Fordham Urb. L.J. 849 (2012).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol39/iss3/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

IN MUSEUMS WE TRUST: ANALYZING THE MISSION OF MUSEUMS, DEACCESSIONING POLICIES, AND THE PUBLIC TRUST

*Sara Tam**

Introduction	850
I. The Mission of Museums and the Recent Deaccessioning Debate	854
A. Background of American Museums	854
1. Types of Museums and Their Organizational Structure	854
2. Exhibiting Art and Sharing Cultural Knowledge	856
3. Developing and Managing a Collection	858
B. Understanding Public Trust Theories.....	860
1. Museums as a Public Trust.....	860
2. The Public's Trust in Museums.....	861
C. History and Development of Deaccessioning Policies	863
1. Professional Codes of Ethics.....	863
2. Judicial Analysis of Deaccessions.....	866
3. Current and Proposed State Legislation.....	868
a. New York State Board of Regents Rules	869
b. Proposed New York State Legislation	871
II. Evaluating the Prohibitions on the Use of Deaccessioning Proceeds.....	872
A. Dictating Deaccessioning Policies: Whose Role?	873
1. Museum Professional Organizations.....	873
2. Judicial Analysis	875
3. State Legislatures	878
B. Examining Trends in Deaccessioning Positions	880
1. The Deaccessioning Absolutist Position	882

* J.D. Candidate, 2013, Fordham University School of Law; A.B. *with Distinction in All Subjects*, 2007, Cornell University. I would like to thank Professors Leila Amineddoleh and Linda Sugin for their advice and guidance. Special thanks to Ted Kaplan for encouraging me to explore deaccessioning. I am grateful to my family and friends for their love and support.

2. A Restrained Approach: A Compromise.....	883
3. A Broader Perspective on Deaccessioning	885
III. A Balanced Approach to Preserving the Public Interest in Museums.....	889
A. Museums Should Lead the Development of Guidelines for Collections Management.....	889
1. Museums Know Themselves Best	890
2. Judicial Analysis Lacks a Comprehensive Approach.....	890
3. State Regulation and Legislation Do Not Accommodate the Diversity of Museums	891
B. Enforcement and Creating an Opportunity for Review...	892
C. Promoting a New Conception of Deaccessioning That Can Protect the Public's Trust in Museums	894
1. An Absolute Prohibition Against Deaccessioning is Inconsistent with Today's Museum	894
2. The Prevalent Restrained Approach Does Not Adequately Protect the Public Interest in Museums ..	895
3. A Broader Approach Allows for a Balanced Treatment of the Museum's Multifaceted Mission	896
Conclusion.....	901

INTRODUCTION

New York City almost lost its leading institution dedicated to the appreciation of traditional folk art¹ in the fall of 2011.² The American Folk Art Museum (Folk Art Museum), a “stubborn, single-minded little institution,” is the world’s center of folk-outsider art, a source of inspiration to the modern art movement, and a counterpoint to contemporary life.³ The fifty-year-old museum was on the brink of closing and dissolving after defaulting on a \$31.9 million loan taken out in 2009 that had been used to build a new flagship site.⁴ At the time, the

1. American Folk Art Museum, *Mission: American Folk Art Museum*, <http://www.folkartmuseum.org/mission> (last visited Feb. 24, 2012).

2. Roberta Smith, *As Folk Art Museum Teeters, a Huge Loss Looms*, N.Y. TIMES, Sept. 20, 2011, at C1 [hereinafter Smith, *Museum Teeters*] (“The Folk Art Museum’s erasure from New York’s cultural skyline would be a tremendous loss, for the city in general and for its role as a center of both art viewing and art making.”). The media first reported in August 2011 that the museum’s trustees were considering closing. Kate Taylor, *Folk Art Museum Considers Closing*, N.Y. TIMES, Aug. 20, 2011, at C1 [hereinafter Taylor, *Considers Closing*].

3. Smith, *Museum Teeters*, *supra* note 2.

4. See Philip Boroff & Katya Kazakina, *Defaulting Folk Art Museum Says It Won’t Sell Works to Pay Debt*, BLOOMBERG (Feb. 3, 2011, 12:44 AM), <http://www.bloomberg.com/news/2011-02-03/folk-art-museum-says-it-wont-sell-works-to-pay-debt.html>.

Folk Art Museum was forced to contemplate how it should disperse its collection of works after closing down the museum.⁵

In California, the Fresno Metropolitan Museum of Art and Science (Fresno Metropolitan) met its end shortly after completing a heavily financed renovation that was intended to revive the museum.⁶ The museum was an important influence on a community that has limited museums and education-related activities.⁷ After defaulting on a fifteen million dollar municipal loan, the twenty-five-year-old museum's last day open to the public was January 5, 2010.⁸ In winding up its affairs, the Fresno Metropolitan sold its collection at auction, using the proceeds toward paying off its debts.⁹

The difficulties of these two institutions illustrate how museums across the country are facing financial challenges and struggling to pursue their mission to acquire, preserve, and exhibit their collections for the benefit of the public.¹⁰ Faced with financial hardship, however, some museums have decided to remove artwork from their collections, a process known as "deaccessioning,"¹¹ and to sell this artwork

bloomberg.com/news/2011-02-03/defaulting-american-folk-art-museum-says-it-won-t-sell-works-to-pay-debt.html. One month later, "[t]he museum was rescued by pledges of donations from trustees and from the Ford Foundation." Robin Pogrebin, *Relief and Optimism at the Folk Art Museum*, N.Y. TIMES, Sept. 23, 2011, at C2 [hereinafter Pogrebin, *Relief and Optimism*].

5. See Taylor, *Considers Closing*, *supra* note 2.

6. Russell Clemings & George Hostetter, *What Killed Fresno Metropolitan Museum?*, FRESNO BEE (Mar. 6, 2010, 10:47 PM), http://www.fresnobee.com/2010/03/06/1849472_p4/what-killed-fresno-metropolitan.html.

7. Reed Johnson, *After a Rebirth, Fresno Museum Closes, Financial Crash, Plus a Prolonged Renovation, Lead to its Shuttering. It Leaves a Void in City*, L.A. TIMES, Jan. 12, 2010, at 1.

8. See *id.*

9. See *id.*

10. See James Cuno, *The Object of Art Museums*, in WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST 49, 52 (James Cuno ed., 2004) [hereinafter Cuno, *Object of Art Museums*] ("[N]othing museums do is more important than adding to our nation's cultural legacy and providing visitors access to it."). See generally Jorja Ackers Cirigliana, Note, *Let Them Sell Art: Why a Broader Deaccession Policy Today Could Save Museums Tomorrow*, 20 S. CAL. INTERDISC. L.J. 365, 368–72 (2011) (describing the effect of the recent financial crisis (2000–2010) on museums).

11. See John E. Simmons, *Collections Management Policies*, in MUSEUM REGISTRATION METHODS 28 (Rebecca A. Buck & Jean Allmam Gillmore eds., 5th ed. 2011) [hereinafter, Simmons, *Collections Management*].

for cash critically needed for the museum to stay open to the public.¹² More often than not, the alternative is closing the museum.¹³

Deaccessioning is one of the most debated and sensitive issues for museums today.¹⁴ The reaction from the museum world has ranged from dismay to disgust, and there is no consensus on the ethics or legality of deaccessioning.¹⁵ Specifically, the controversial question is how museums should be able to use the funds received from selling a deaccessioned artwork.¹⁶ The deaccessioning debate focuses on whether deaccessioning and the use of the proceeds of deaccessioning sales for operating costs breaches a museum's duty to the public.¹⁷ Professional ethical codes and state regulations permit the use of proceeds only for future purchases for the collection, or for collection preservation costs.¹⁸ Nevertheless, some museums intend to use the

12. See, e.g., Johnson, *supra* note 7 ("Some cash-strapped museums have contemplated selling off parts of their collections to raise money, an action that most museum ethicists regard as a violation of public trust.").

13. See, e.g., *infra* note 150 (listing examples of museums for whom selling artwork was the only way to raise funds for operating costs and avoid shutting down).

14. See, e.g., Martha Morris, updated by Antonia Moser, *Deaccessioning*, in MUSEUM REGISTRATION METHODS 100, 100 (Rebecca A. Buck & Jean Allmam Gillmore eds., 5th ed. 2011); Robin Pogrebin, *Permanent Collection May Not Be So Permanent*, N.Y. TIMES, Jan. 27, 2011, at C1 [hereinafter Pogrebin, *Permanent Collection*] ("A few years ago sales [from museum collections] were likely to have gone unnoticed. Yet deaccessioning . . . has become a dirty word and the focus of increasingly intense attention.").

15. Museums and historical houses that have contemplated selling art from the collection include the Pearl S. Buck Foundation in Pennsylvania, Montclair Art Museum in New Jersey, and the Los Angeles County Museum of Art in California. While some try to defend the decision, most of the media's reactions were disparaging. See, e.g., Jeff Gammage, *Pearl S. Buck Foundation to Sell Two Edward Redfield Paintings*, PHILLY.COM (Sept. 16, 2011) http://articles.philly.com/2011-09-16/news/30183289_1_edward-redfield-green-hills-farm-foundation-board ("[I]t was such a carefully considered decision . . . It's a sacrifice for the better good of the house."); James Panero, *Another Art Museum Puts Its Collection on the Block*, WALL ST. J., Apr. 15, 2009, at D13 ("Presented as curatorial housekeeping, but in fact motivated by financial exigencies, the Montclair sales . . . will set another sorry example of an institution cashing out on art in the public trust."); Lee Rosenbaum, Op-Ed, *For Sale: Our Permanent Collection*, N.Y. TIMES, Nov. 2, 2005, at A29 [hereinafter Rosenbaum, *For Sale*] ("These sales [by the Los Angeles County Museum] are the latest sign that cultural institutions can no longer be relied on to protect public patrimony.").

16. Pogrebin, *Permanent Collection*, *supra* note 14 ("Cultural institutions . . . have generated controversy by selling or even considering selling items to cover operating costs, a practice forbidden by the professional association for art museum directors.").

17. See, e.g., *supra* note 15.

18. See N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27 (2011); AM. ASS'N OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS 3 (2000) [hereinafter AAM CODE]; ASS'N OF

proceeds towards operating costs because they lack the necessary funding for those expenses.¹⁹ Even so, museum professional organizations sanction museums for violating ethics codes, and donors and attorneys general sue museums for breaching gift restrictions and fiduciary duties.²⁰

This Note demonstrates that the emphasis on collections management policies undermines a museum's mission to provide public access to its collections and exhibitions, whether the emphasis originates from museum professional organizations, legislative and judicial action, or media criticism. It highlights the relationship between museums and the public, exploring museums' duty to the public, the public's support of museums, and the public's expectations of museums. Defining this relationship is a key factor in shaping museum standards. This Note provides a comprehensive examination of the varying perspectives on the legal and ethical duties currently imposed on museums.

Part I provides an overview of the museum's mission to collect and exhibit art for the benefit of the public. It also describes the historical development of museum standards and deaccessioning policies. Part II evaluates the effectiveness of current and proposed policies on deaccessioning and the use of deaccessioning sales proceeds, as well as the theories supporting those policies. Part III posits that museums can be trusted to develop and enforce standards that equally reflect the public interest in museums themselves, their collections, and the educational experiences museums offer. Therefore, this Note suggests that legislative intervention is unnecessary to protect the public interest in museums and their collections.

ART MUSEUM DIRS., PROF'L PRACTICES IN ART MUSEUMS ¶ 25 (2011) [hereinafter AAMD PROF'L PRACTICES]; see also *Tamayo Watermelon Painting to Sell in NYC*, AP ALERT—NY, Nov. 16, 2011 (reporting that the Museum of Modern Art in New York was selling a painting by Mexican artist Rufino Tamayo from its collection to benefit its acquisitions fund); Sebastian Smee, *For Masterpiece, MFA Will Sell 8 in Collection*, BOSTON GLOBE, Sept. 19, 2011, at 1 (reporting that the Museum of Fine Arts, Boston will sell paintings by Claude Monet, Paul Gauguin, Alfred Sisley, Camille Pissarro, and Auguste Renoir to buy a masterpiece by Gustave Caillebotte).

19. See, e.g., *infra* note 150 (listing examples of museums for which selling artwork was the only way to raise funds for operating costs and avoid shutting down).

20. See, e.g., Mason Kerns, *Selling the Picasso to Fix the Plumbing: An Analysis of Five High-Profile Deaccessioning Attempts*, in LEGAL ISSUES IN MUSEUM ADMINISTRATION 217 (Apr. 2010).

I. THE MISSION OF MUSEUMS AND THE RECENT DEACCESSIONING DEBATE

Defining standards for how a museum should manage its collection and perform its social duties requires an understanding of the museum's dual and dependent goals of collecting and exhibiting objects for the benefit of the public. Part I.A provides an overview of the different types of museums in the United States and explains their common mission to build collections and to provide access to lifelong learning through exhibitions. Part I.B discusses interpretations of the public trust theory with respect to museums. Part I.C explains the current legal and non-legal policies on collections management.

A. Background of American Museums

Museums are unique in their focus on visual- and object-based learning.²¹ Thus, the museum's relationship with its collections is distinct from the museum's relationship with its financial assets.²² This Section illuminates the museum-collection relationship by explaining the range museums embody in topical focus and organizational structure, discussing the role of collections exhibitions in providing public access to cultural knowledge, and describing the mechanics of managing a museum collection.

1. *Types of Museums and Their Organizational Structure*

While the diversity of the types of museums in the United States is broad, the typical museum makes its distinct contribution to the public by collecting, preserving, and interpreting objects.²³ A unique characteristic of American museums is that they are predominately

21. See, e.g., James N. Wood, *The Authorities of the American Art Museum*, in WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST 103, 110 (James Cuno ed., 2004) [hereinafter, Wood, *Authorities*].

22. See Gresham Riley, *To Sell Art or Not to Sell: A Modest Solution for Struggling Museums*, BROAD ST. REV. (Feb. 1, 2011), http://www.broadstreetreview.com/index.php/main/article/when_museums_sell_art_a_better_way/.

23. AAM CODE, *supra* note 18; see also Cuno, *Object of Art Museums*, *supra* note 10 ("[N]othing museums do is more important than adding to our nation's cultural legacy and providing visitors access to it . . ."). The American Association of Museums is a professional organization that promotes the excellence of and advocates for the museum community. *About AAM*, AM. ASS'N OF MUSEUMS, <http://www.aam-us.org/aboutaam/index.cfm> (last visited Mar. 1, 2012) [hereinafter *About AAM*]. For further discussion about the American Association of Museums and other museum professional organizations, see *infra* Part I.C.1.

private institutions with a public role.²⁴ This structure is different from the structure of European museums, which are mostly state organizations with public funding.²⁵ Importantly, individual impetus is the driving force behind American museums.²⁶ Individuals create museums by developing the mission, financing the facility and operations, and building the museum collection from their personal collections and new purchases.²⁷ A museum's mission, approach, and style all reflect the vision of an individual or a private group of founders, which makes each museum's character unique.²⁸ The types of museums range from art and natural history to anthropology and science museums.²⁹ The result is a diverse array of museums that collect and exhibit everything from paintings and sculptures to scientific tools and computers, from jewelry and beads to trains and trucks.³⁰

Charitable trusts and non-profit corporations are the organizational structures generally available to private museums.³¹ The educa-

24. Glenn D. Lowry, *A Deontological Approach to Art Museums and the Public Trust*, in WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST 129, 129 (James Cuno ed., 2004) [hereinafter Lowry, *Deontological Approach*]. There are some government-operated museums in the United States such as the Smithsonian and the New York State Museum.

25. *Id.*; see also Emma Barker, *Introduction to Part I: The Changing Museum*, in CONTEMPORARY CULTURES OF DISPLAY 23, 23–25 (Emma Barker ed., 1999).

26. Wood, *Authorities*, *supra* note 21, at 112.

27. *Id.*

28. See Lowry, *Deontological Approach*, *supra* note 24, at 136 (“[M]useums are devoted to transforming and translating their founders’ ideas into concrete reality through the presentation of tangible and authentic objects set in a particular place”). A prime example of a museum representing the vision of its founder is the Isabella Stewart Gardner Museum in Boston, Massachusetts, where the “[h]istoric collection remains as Gardner created it.” *History and Architecture*, ISABELLA STEWART GARDNER MUSEUM, http://www.gardnermuseum.org/about/history_and_architecture (last visited Feb. 24, 2012).

29. See *About AAM*, *supra* note 23. This Note focuses on museums that collect and exhibit art. The economic and cultural value of art in our society fuels the debate about deaccessioning and the use of deaccessioning proceeds.

30. *E.g.*, BEAD MUSEUM, WASHINGTON, DC, <http://www.beadmuseumdc.org/index.html> (last visited Mar. 1, 2012); COMPUTER HISTORY MUSEUM, <http://www.computerhistory.org/> (last visited Mar. 1, 2012); *Museum Mission Statement*, THE METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/about-the-museum/mission-statement> (last visited Sept. 12, 2000); NEW YORK TRANSIT MUSEUM, <http://www.mta.info/mta/museum/> (last visited Mar. 1, 2012); WOOD LIBRARY MUSEUM OF ANESTHESIOLOGY, <http://www.woodlibrarymuseum.org/> (last visited Mar. 1, 2012).

31. See *About AAM*, *supra* note 23. The American Association of Museums, the Association of Art Museum Directors, and the International Committee on Museums limit their definition of museums to non-profit organizations. See *What is a Museum?*, AM. ASS’N OF MUSEUMS, <http://www.aam-us.org/aboutmuseums/whatis.cfm> (last visited Mar. 1, 2012); *About AAMD*, ASSOC. ART MUSEUM DIRS., <http://www.aamd.org/>

tional purpose of museums under these structures entitles them to tax-exemptions, and entitles their donors to tax deductions.³² Some museums stand alone, while others are part of a larger non-profit organization, such as a university.³³ Although the general mission of all museums runs along the same lines, their organizational differences, in terms of legal structure, budget, and physical space, result in different priorities and approaches to achieving that mission.³⁴

2. *Exhibiting Art and Sharing Cultural Knowledge*

With their topical and organizational differences, each museum has its own concerns and priorities, but what museums have in common is the desire to provide educational experiences by offering public access to curated and intellectually stimulating exhibitions.³⁵ The Association of Art Museum Directors defines an art museum as an institution “primarily concerned with the exhibition of works of art.”³⁶ The education that a museum visitor receives is not merely the result of the collection of art owned by the museum, but also results from the pedagogical role of visual displays.³⁷ Indeed, museums produce and share cultural knowledge through exhibitions.³⁸

org/about/ (last visited Mar. 1, 2012) [hereinafter *About AAMD*]; see also Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1048 (1996) [hereinafter White, *OK to Sell*] (citing MARILYN PHELAN, *MUSEUMS AND THE LAW* 1–7 (1982)).

32. 26 U.S.C. § 501(c)(3) (2010); see also 26 U.S.C. § 170 (2010).

33. See *About AAMG*, ASSOC. OF ACADEMIC MUSEUMS & GALLERIES, http://www.aamg-us.org/mission_statement.php (last visited Mar. 1, 2012). For a discussion that distinguishes the relationship stand-alone art museums have with their collection from the relationship universities and their art museums have with their collections, see Linda Sugin, *Lifting the Museum's Burden from the Backs of the University: Should the Art Collection Be Treated as Part of the Endowment?*, 44 NEW ENG. L. REV. 541 (2010).

34. See *infra* Part I.C.

35. The International Council of Museums (ICOM) says “[a] museum is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.” INT’L COUNCIL OF MUSEUMS, ICOM STATUTES, art. 3.1 (2007), available at <http://icom.museum/who-we-are/the-organisation/icom-statutes/3-definition-of-terms.html#sommairecontent>; see also Wood, *Authorities*, *supra* note 21, at 114 (“[T]he public looks to the museum for help in negotiating memory just as they count on us to preserve and present beauty.”).

36. *About AAMD*, *supra* note 31.

37. EILEAN HOOPER-GREENHILL, *MUSEUMS AND THE INTERPRETATION OF VISUAL CULTURE* 2 (2000).

38. *Id.* at 4.

Furthermore, a museum expresses its voice and vision through the thoughtful and researched display of the artwork and cultural objects.³⁹ Even if objects could speak for themselves, in the museum setting, visitors see objects through a lens constructed by the museum and the curator.⁴⁰ The process of selecting objects, both for the museum's collection and for a particular exhibition, is a vehicle through which to construct meaning.⁴¹ The selection process can work to reinforce canons, a dominant point of view, and aesthetic values.⁴² The context of an object imparts significant aspects of its meaning, and the context that the museum provides is an amalgamation of the role of the board of trustees, the donors, the museum's architecture and interior design, the gallery's layout and display of art, as well as the information provided to visitors.⁴³ Through exhibitions, museums offer their visitors an opportunity to exercise critical faculties and develop new perspectives; this is the lifelong learning that museums provide.⁴⁴ In addition to education through exhibitions, the museum is a place of academic scholarship.⁴⁵

As creative and expressive cultural institutions,⁴⁶ museums are important civic institutions that play an indispensable role in a community's identity, contributing to civic pride, cultural understanding, and

39. See AAMD PROF'L PRACTICES, *supra* note 18, at 4.

40. See Rebecca Buck, *Collection Roles*, in MUSEUM REGISTRATION METHODS 12, 13 (Rebecca A. Buck & Jean Allmam Gillmore eds., 5th ed. 2011) (defining a curator's role in developing exhibitions); HOOPER-GREENHILL, *supra* note 37, at 3 ("Objects in museums are assembled to make visual statements which combine to produce visual narratives."). Simultaneously, "visitors deploy their own interpretive strategies and repertoires." *Id.*

41. HOOPER-GREENHILL, *supra* note 37, at 3.

42. Barker, *supra* note 25, at 25.

43. Christoph Grunenberg, *The Modern Art Museum*, in CONTEMPORARY CULTURES OF DISPLAY 26, 27 (Emma Barker ed., 1999). The way that museums teach through display has changed over time, due in part to the way they collect and in part to changing attitudes on the best context in which to view art. In the nineteenth and early twentieth centuries, "[v]irtually every painting owned by every museum . . . was constantly on exhibition. The custom was to hang as many pictures as possible, as close together as possible, often placing several paintings one above the other." Wiltach Estate, 1 Pa. D. & C.2d 197, 207 (1954). Today, museums have adopted the white-cube model, where the gallery is a clean space with white walls with artworks hung wide apart in single rows. See generally Grunenberg, *supra*. Grunenberg argues that this supposedly neutral context in which to view art is anything but neutral. *Id.*

44. See Wood, *Authorities*, *supra* note 21, at 110.

45. See Elizabeth Mansfield, *Introduction*, in ART HISTORY AND ITS INSTITUTIONS: FOUNDATIONS OF A DISCIPLINE 1, 2 (Elizabeth Mansfield ed., 2002) (stating that museums are one of the foundations of the discipline of art history).

46. See Emma Barker, *Introduction*, in CONTEMPORARY CULTURES OF DISPLAY 8, 13-14 (Emma Barker ed., 1999)

scholarship.⁴⁷ Each one has a unique focus in the art and objects it collects, and a unique style of presenting its collection and providing a place for learning.⁴⁸

3. *Developing and Managing a Collection*

Managing the museum collection is a cornerstone of museum operations.⁴⁹ Collections management encompasses documenting, preserving, and developing museum collections for study and exhibition.⁵⁰ A collections management policy guides the museum toward achieving the museum's mission and enables the museum to meet its legal and ethical obligations.⁵¹ A comprehensive policy is essential because it clarifies and explains the purpose of an individual museum and the duties of that museum's officers and staff.⁵² Developing and managing a collection is the counterpart to the museum's mission to exhibit and share cultural knowledge.

Ideally, a collections management policy addresses the standards for acquiring artworks for and disposing of artworks from the museum collection.⁵³ Usually, the curators, the director, and the board of trustees are all involved in deciding on acquisitions and dispositions.⁵⁴ A museum acquires artwork by purchase, exchange, gift, or bequest.⁵⁵ "Acquisition" refers to the transfer of ownership title to the museum.⁵⁶ "Accessioning" is the formal process of registering into the mu-

47. See Smith, *Museum Teeters*, *supra* note 2 (noting that a museum and its collection are a civic, business, and cultural asset).

48. Lowry, *Deontological Approach*, *supra* note 24, at 136 ("[N]o two art museums are alike since no two . . . share the same idea and the same set of objects, not to mention the same building and community. Architecturally and programmatically this means that there can never be a single typology for the art museum, since each museum is unique.").

49. DANIEL B. REIBEL, *REGISTRATION METHODS FOR THE SMALL MUSEUM* 5 (4th ed. 2008) ("The museum registration system is the museum's memory . . . A museum that fails to keep good records fails in its primary function; some would say its only function.").

50. Simmons, *Collections Management*, *supra* note 11, at 24.

51. See *id.*; see also AAMD PROF'L PRACTICES, *supra* note 18, ¶ 12.

52. MARIE C. MALARO, *A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS* 46 (2d ed. 1998) [hereinafter MALARO, *LEGAL PRIMER*]. Malaro also states that "[t]he form and content of any policy rests essentially with the individual museum, and it should be tailored to the needs of the museum." *Id.* at 46.

53. *Id.*

54. AAMD PROF'L PRACTICES, *supra* note 18, ¶ 15.

55. Clarisse Carnell & Rebecca Buck, *Acquisitions and Accessioning*, in *MUSEUM REGISTRATION METHODS* 44, 44 (Rebecca A. Buck & Jean Allmam Gillmore eds., 5th ed. 2011).

56. *Id.*

seum's collection an artwork acquired by the museum.⁵⁷ The artwork officially becomes part of the museum collection when the museum registrar, the figure responsible for the documentation of the collection, accessions it into the museum's collections records.⁵⁸ Deaccessioning is the process of permanently removing an object from a museum's collection.⁵⁹ Museum curators, directors, and boards of trustees typically decide to deaccession an artwork because the artwork no longer fits the museum's mission, the artwork is of poor or deteriorating quality, or for legal reasons.⁶⁰ A museum then disposes of a work by sale, auction, exchange, or grant to an individual or another institution.⁶¹

Developing and refining a museum collection involves both accessioning and deaccessioning.⁶² Museums can, if the object was acquired without restriction against sale,⁶³ deaccession to refine and enhance the quality, use, and character of its holdings.⁶⁴ This type of deaccessioning reflects changing tastes and new scholarship.⁶⁵ It is

57. MALARO, *LEGAL PRIMER*, *supra* note 52, at 60; *see also* Reibel, *supra* note 49, at 53 (adding that accessioning "is a serious step"). "Accession" is a noun, verb, and adjective, referring to the transaction of acquiring one or more objects, the act of acquiring and registering an object, and describing an object that has been accessioned or something related to accessioning procedures. *Accession, Accessioning, Accessioned*, in *MUSEUM REGISTRATION METHODS* 51, 51–52 (Rebecca A. Buck & Jean Allmam Gillmore eds., 5th ed. 2011).

58. *See* Buck, *supra* note 40, at 13; Carnell & Buck, *supra* note 55, at 44.

59. MALARO, *LEGAL PRIMER*, *supra* note 52, at 217. Deaccessioning and disposing are two separate steps; nevertheless, people frequently refer collectively to the deaccession and disposal by sale of an artwork as "deaccessioning." *See, e.g.*, Christopher Knight, *Art Museum Directors Call for Boycott*, L.A. TIMES CULTURE MONSTER (Dec. 5, 2008, 1:25 PM), <http://latimesblogs.latimes.com/culturemonster/2008/12/national-academ.html> ("Deaccessions (or sales) of art from museum collections is a subject fraught with difficulty . . .") (emphasis added). This Note will maintain a distinction between the two concepts of removing an artwork from the collection and selling the artwork.

60. Simmons, *Collections Management*, *supra* note 11, at 28. Legal reasons include repatriation or compliance with statutes such as the Native American Grave Protection and Repatriation Act. 25 U.S.C §§ 3001 (1)–(13) (1990).

61. *See* ASS'N OF ART MUSEUM DIRS., *ART MUSEUMS AND THE PRACTICE OF DEACCESSIONING* (Nov. 2007), *available at* <http://aamd.org/papers/>; Morris, *supra* note 14, at 102–05.

62. *See, e.g.*, Simmons, *Collections Management*, *supra* note 11, at 27–28 (commenting that adding and removing artworks from a collection are ways to focus and refine the collection, to allow the museum to better serve its mission).

63. John Canaday, *Very Quiet and Very Dangerous*, N.Y. TIMES, Feb. 27, 1972, at D21.

64. ASS'N OF ART MUSEUM DIRS., *supra* note 61.

65. *Wilstach Estate*, 1 Pa. D. & C.2d 197, 207 (1954) ("An art museum, if it is to serve the cultural and educational needs of the community, cannot remain static. It

deemed a practice necessary for the growth of the museum itself and for the development of its collection.⁶⁶ By writing and embracing informed and structured collections management policies, a museum can ensure that it keeps only the artworks of the highest educational, historical, and artistic quality.⁶⁷

B. Understanding Public Trust Theories

A museum carries out its mission to collect and exhibit objects for the benefit of the public.⁶⁸ Understanding the different ways that the concept of “public trust” can apply to museums and their collections illustrates why there is no consensus on the issue of deaccessioning. The different interpretations also explain why many commentators deem using deaccessioning sales proceeds to pay operating costs a failure of the museum’s duty to the public. Part I.B.1 discusses the public trust as a legal entity and as a legal doctrine. Part I.B.2 explains the concept of the public’s trust and confidence in museums to fulfill their public missions.

1. Museums as a Public Trust

Discussions about deaccessioning center around the theory that museums hold their collections in a public trust and that the public trust doctrine should apply to museum collections.⁶⁹ A public trust is distinguishable from the public trust doctrine. Public trust refers to the type of organizing structure a museum may have, as well as the legal responsibilities that that structure demands.⁷⁰ A public, or charitable, trust is a trust designed to benefit the public.⁷¹ A museum organized as a public trust has the fiduciary duties to use trust property for designated charitable purposes.⁷²

The public trust doctrine holds that the public has a right to the use of navigable waters, a right that the state is responsible for protecting.⁷³ Historically, the doctrine has been applied to the protection of

must keep abreast of the advances of the times, like every other institution whose purpose is to educate and enlighten the community.”).

66. *Id.*

67. *Id.* at 208; see Morris, *supra* note 14, at 100.

68. See, e.g., AAM CODE, *supra* note 18.

69. See *infra* Part II.B.

70. See White, *OK to Sell*, *supra* note 31 1048–51.

71. BLACK’S LAW DICTIONARY 1649 (9th ed. 2009).

72. RESTATEMENT (SECOND) OF TRUSTS § 348 (1959).

73. BLACK’S LAW DICTIONARY 1352 (9th ed. 2009).

the public's access to natural resources, even when the land or resource is owned privately.⁷⁴ Courts have held that land and natural resources that once belonged to the public trust cannot return to private hands.⁷⁵ Before entering a museum collection, art is private property with no public interest.⁷⁶ Thus, the public trust doctrine, as applied to museums, connotes the idea that art owned by museums is part of the public domain for the public benefit.⁷⁷ In this regard, the public trust doctrine would treat art as an abstract trust held by public institutions as a public resource.⁷⁸ Thus, it would be misleading to analogize art donated to museums to navigable waters.⁷⁹

In another interpretation of "public trust," the New York State Board of Regents codified the definition of public trust as the museum's responsibility to serve and hold assets in trust for the public benefit.⁸⁰ Despite these varying definitions, every side of the deaccessioning debate refers to museums as a public trust to reference the duties museums owe to the public with respect to their operations and collections management.⁸¹

2. *The Public's Trust in Museums*

On the other hand, leaders in the museum field have put their own twist on the term "public trust," and they employ the term not only in the legal sense of setting aside property for the benefit of the public, but also to refer to "the public's trust in art museums" as a moral is-

74. See generally Derek Fincham, *Deaccession of Art from the Public Trust*, 16 ART ANTIQUITY & L. 1, 23–24 (2011) (discussing the history of public trust doctrine analysis).

75. See Patty Gerstenblith, *The Fiduciary Duty of Museum Trustees*, 8 COLUM.-VLA J.L. & ARTS. 175, 184 (1983) (citing *Payne v. Kassab*, 361 A.2d 263 (1976)).

76. But see, e.g., JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (1999) (advocating for implying a public interest in art, even if privately owned, paralleling the public trust doctrine treatment of natural resources).

77. See, e.g., Fincham, *supra* note 74, at 23; Gerstenblith, *supra* note 75, at 184.

78. *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 163 n.3 (Ct. App. 1987) (noting that the public trust doctrine "pertains to abstract trusts, such as tidelands and waterways, and not to formal charitable trusts) (citing *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 431 (1983)).

79. See MALARO, *LEGAL PRIMER*, *supra* note 52, at 220 n.9.

80. N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27(a)(18) (2011).

81. See, e.g., AAMD PROF'L PRACTICES, *supra* note 18; Simmons, *Collections Management*, *supra* note 11, at 24. See generally Donn Zaretsky, *THE ART LAW BLOG*, <http://theartlawblog.blogspot.com/> (last visited Mar. 31, 2012).

sue.⁸² The public's trust refers to the trust and confidence that the public has given to the museum to collect, preserve, and make available works of art.⁸³ This view contends that the public has entrusted museums with the authority and responsibility to develop and manage a collection of art and provide public enjoyment of art through exhibitions.⁸⁴

One important question when exploring the public's trust in museums is the scope of the "public" referred to in the public trust concept.⁸⁵ Specifically, the question is whether the scope encompasses the public on a national or regional level, or even more narrowly, the community that the museum actually serves.⁸⁶ The issue is whether the interests and concerns of the public that a museum serves are the same as those of another community.⁸⁷

Museum mission statements define the museum's purpose and obligation to its own community.⁸⁸ As private institutions, museums have to establish their authority to accomplish their missions, thereby gaining the public's trust.⁸⁹ Maintaining the public's trust, accordingly, is a matter of maintaining the museum's authority and trustworthiness in defining its mission and having the proper means, whether financial or human resources, facilities, or collections, to carry out

82. Lowry, *Deontological Approach*, *supra* note 24, at 143. The director of the Museum of Modern Art in New York asks, "But what is public trust? How is this trust created, and what does it mean to lose it? Is the concept of public trust an ethical or legal one?" *Id.* at 133. The director of the Art Institute in Chicago contends that the relationship between museum and the public is intentionally one determined by trust, not law. Wood, *Authorities*, *supra* note 21, at 121.

83. *See, e.g.*, Cuno, *Object of Art Museums*, *supra* note 10, at 73 ("The public has entrusted in us the authority and responsibility to select, preserve, and provide its access to works of art . . ."); Lowry, *Deontological Approach*, *supra* note 24, at 143 ("For insofar as public trust means retaining the confidence of the public, museums must be perceived to be acting both responsibly and for the common good.").

84. *See* Cuno, *Object of Art Museums*, *supra* note 10, at 73 ("And in turn, we have agreed to dedicate all of our resources—financial, physical, and intellectual—to this purpose. Art museums are a public trust.").

85. Lowry, *Deontological Approach*, *supra* note 24, at 133.

86. *Id.*

87. *Id.*

88. Museum mission statements can, and should, be reassessed over time to reflect experience and changing aspirations. Wood, *Authorities*, *supra* note 21, at 120.

89. *See generally id.* (positing that the public's trust in museums is founded upon the museum's authority, for which there are eight types: nourishment, expertise, hierarchy, memory, conservation, architecture, mission, and leadership). The nature of the museum's authority is essential because "if the museum fails to carefully define and conscientiously exercise this authority, it will fail the very public that has granted it and which ultimately has the power to revoke it." *Id.* at 104.

that mission.⁹⁰ Recently, this authority has been significantly undermined by disagreements internal to as well as outside of the museum field about how museums should manage their collections.⁹¹

C. History and Development of Deaccessioning Policies

Deaccessioning is a common and necessary process for museums to manage their collections.⁹² The practice of deaccessioning, however, is often controversial because when an artwork is part of a museum's collection it transforms into a protected object.⁹³ Since the 1970s, museums and their stakeholders have become increasingly concerned with the need for deaccessioning policies that comport with the museum's mission and legal obligations, as well as with the public's expectations of museum accountability.⁹⁴ Intense media attention on the deaccessioning policy debate escalates the urgency with which museums, courts, and legislators try to develop sustainable policies.⁹⁵ Part I.C identifies three sources of prescriptions on collections management policies: museums' professional codes of ethics, judicial analysis, and state legislation.

1. Professional Codes of Ethics

The longest standing guidelines for the museum community on deaccessioning policies originate from museum professional organizations. The most prevalent organizations are the Association of American Museums (AAM), which encompasses all types of museums and their staff,⁹⁶ and the Association of Art Museum Directors (AAMD), a smaller group comprised of directors of art museums.⁹⁷ Both of the-

90. *See id.*

91. *See infra* Part II.

92. *See supra* Part I.A.3.

93. Reibel, *supra* note 49, at 53 ("Before the object is accessioned it is a piece of property with which the owners can do anything they wish . . ."). For an example of a museum avoiding deaccessioning restrictions by selling artwork donated to the museum before accessioning them into the collection, see Judith H. Dobrzynski, *What About That Clyfford Still Museum Plan To "Deaccession"?*, REAL CLEAR ARTS (Nov. 18, 2010, 8:18 PM), http://www.artsjournal.com/realcleararts/2010/11/clyfford_still_deaccessioning.html.

94. *See* MALARO, LEGAL PRIMER, *supra* note 52, at 230; Morris, *supra* note 14, at 100.

95. *See* Chris Burgess & Rachel Shane, *Deaccessioning: A Policy Perspective*, 41 J. ARTS MGMT. L. & SOC'Y 170, 175 (2011).

96. *About AAM*, *supra* note 23.

97. *About AAMD*, *supra* note 31. There is also the ICOM, an international network of institutions and museum professionals. ICOM MISSIONS, INT'L COUNCIL OF

se organizations seek to advance the museum field by establishing and promoting the highest professional and ethical standards in order to validate the self-governance of museums.⁹⁸ AAM also conducts an accreditation program, which awards museums with a widely recognized seal of approval for “its commitment to excellence, accountability, high professional standards and continued institutional improvement.”⁹⁹

AAM and AAMD strictly limit the use of deaccessioning funds to acquiring other items for the museum’s collection.¹⁰⁰ These organizations want to restrict the use of deaccession proceeds because, once an object enters a museum collection, it becomes part of the public trust,¹⁰¹ and a museum’s directors and trustees have a duty to protect and maintain the object for the benefit of the public.¹⁰²

Museums and professional organizations began promulgating ethical codes on deaccessioning, and museum practices in general, in response to Metropolitan Museum of Art in New York’s (Metropolitan

MUSEUMS, <http://icom.museum/who-we-are/the-organisation/icom-missions.html> (last visited Feb. 24, 2012).

98. AM. ASS’N OF MUSEUMS, CONSTITUTION AND BYLAWS art. II § 1 (2009), *available at* http://www.aam-us.org/aboutaam/governance/upload/AAM_Constitution_and_Bylaws_February_2009-20_final.pdf [hereinafter AAM CONSTITUTION]; *About AAMD*, *supra* note 31. Membership, however, is voluntary, so many museums choose to be subject to these rules. Yet, in the museum field, it is of critical importance to a museum to achieve accreditation and to be a member of these organizations. The standards that organizations like AAM and AAMD set are very influential in the museum world—museums will endeavor to follow them even if they are not yet accredited or members. For further discussion, see *infra* Part II.A.1.

99. *AAM Accreditation Program*, AM. ASS’N OF MUSEUMS, <http://www.aam-us.org/museumresources/accred/> (last visited Feb. 24, 2012).

100. AAM CODE, *supra* note 18, at 3 (“Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum’s discipline, but in no event shall they be used for anything other than acquisition or direct care of collections.”); AAMD PROF’L PRACTICES, *supra* note 18, ¶ 25 (“Funds received from the disposal of a deaccessioned work shall not be used for operations or capital expenses. Such funds . . . may be used only for the acquisition of works of art in a manner consistent with the museum’s policy on the use of restricted acquisition funds.”); *see also* INT’L COUNCIL OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS § 2.16 (2006), *available at* <http://network.icom.museum/icom-us.html> [hereinafter ICOM CODE] (“Museum collections are held in public trust and may not be treated as a realizable asset. Money or compensation received from the deaccessioning and disposal . . . should be used solely for the benefit of the collection and usually for acquisitions to that same collection.”).

101. See discussion of the public trust concept *supra* Part I.B.

102. *See generally* AAM CODE, *supra* note 18; AAMD PROF’L PRACTICES, *supra* note 18.

Museum) plan to sell several major artworks in 1972.¹⁰³ The New York State Attorney General initiated an investigation of the Metropolitan Museum after *The New York Times* reported that the museum had sold paintings from a bequeathed collection.¹⁰⁴ *The New York Times* article harshly criticized the museum for deaccessioning to sell the paintings for cash, or for any reason at all.¹⁰⁵ In the end, the Attorney General decided that self-regulation, rather than legislative intervention, would allow museums to establish policies and guidelines that the public could trust.¹⁰⁶ Collaborating with the Attorney General's office, the Metropolitan Museum drafted new collections management policies that required the museum to notify the Attorney General of decisions to deaccession, to sell deaccessioned objects at public auction, and to get court approval for any deviations from donor restrictions.¹⁰⁷ The Metropolitan Museum case brought to light many issues at the intersection of museum governance and the law that are still central to today's discussion about museum deaccessioning.¹⁰⁸ These issues include the public interest in the objects in museum collections, whether art in museum collections should ever move to private hands, and the State Attorney General's role in overseeing charitable organizations.¹⁰⁹

More recently, the National Academy of Art (National Academy), a member of AAMD, decided to sell paintings from its collection to raise revenue needed for immediate operating costs.¹¹⁰ The board's decision was supported by a nearly unanimous vote from the artist

103. Burgess & Shane, *supra* note 95, at 173; Cirigliana, *supra* note 10, at 365; see AAM CODE, *supra* note 18.

104. See Rousseau, Theodore, Jr., DICTIONARY OF ART HISTORIANS, <http://www.dictionaryofarthistorians.org/rousseaut.htm> (last visited Feb. 24, 2012); Canaday, *supra* note 63.

105. See Canaday, *supra* note 63.

106. Burgess & Shane, *supra* note 95, at 172.

107. JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 1275 (5th ed. 2007).

108. *E.g.*, Burgess & Shane, *supra* note 95, at 173.

109. See, *e.g.*, *id.*; Marion Maneker, *The Problems with the Public Trust*, ART MARKET MONITOR (Apr. 2, 2009), <http://artmarketmonitor.com/2009/04/02/the-problems-with-public-trust> (“[T]he problem with the deaccessioning debate is that it debates the wrong subject—whether works can be sold for any other reason than buying different works. The real deaccessioning debate has yet to take place. That debate would revolve around the question of who is the best custodian for a work of art—and [sic] individual or an institution—and what are the best mechanisms for transferring custody of the works—the art market or institutional authority.”).

110. Robin Pogrebin, *Branded a Pariah, the National Academy is Struggling to Survive*, N.Y. TIMES, Dec. 22, 2008, at C1 [hereinafter Pogrebin, *Branded a Pariah*].

members of the National Academy.¹¹¹ Knowing that this decision violated the ethical codes of AAMD, the Academy withdrew its membership from the association.¹¹² This move elicited a quick and caustic response from AAMD, which issued a letter reprimanding the Academy's decision and forbidding all members from collaborating with the Academy on exhibition loan programs.¹¹³ Cutting the National Academy off from the museum network in this manner further crippled the museum's ability to mount exhibitions, increase admissions numbers, and remain relevant to the community, which are factors that influence the philanthropic support a museum will receive for operating expenses.¹¹⁴ Even though the museum was on the brink of closing down, the AAMD was adamant about making an example of the Academy for the rest of the museum community.¹¹⁵

2. Judicial Analysis of Deaccessions

Courts have addressed cases challenging museum deaccessions by examining donor intent and fiduciary duties. Courts will analyze donor intent under the *cy prè*s doctrine, which allows the courts to modify terms of a gift or trust that have become impracticable or wasteful to apply.¹¹⁶ Courts will approve of a different use of the property to the extent that the use reasonably approximates the original purpose of the gift or trust in light of new, extenuating circumstances.¹¹⁷ In a notable case, the Tennessee Court of Appeals approved of the Fisk University's agreement with Crystal Bridges Museum of American Art (Crystal Bridges), an Arkansas museum, to sell to Crystal Bridges a one-half interest in a collection of artwork donated by Georgia

111. *Id.* (artist members voted 183 to 1, with one abstention, to sell the paintings).

112. Christopher Knight, *Art Museum Directors Call for Boycott*, CULTURE MONSTER, L.A. TIMES (Dec. 5, 2008, 1:25 PM), <http://latimesblogs.latimes.com/culturemonster/2008/12/national-academ.html>.

113. Pogrebin, *Branded a Pariah*, *supra* note 110.

114. See Judith H. Dobrzynski, *The Academic Dilemma*, WALL ST. J. (Sept. 15, 2011), www.online.wsj.com/article/SB10001424053111903461304576526744239052266.html [hereinafter Dobrzynski, *Academic Dilemma*].

115. The AAMD's reaction is at odds with its recognition that application of its principles depends on the particular circumstances that a museum faces. See *infra* note 171 and accompanying text.

116. RESTATEMENT (THIRD) OF TRUSTS § 67; Gerstenblith, *supra* note 75, at 188.

117. RESTATEMENT (THIRD) OF TRUSTS § 67; PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 272 (2d ed. 2008) (describing the *cy prè*s doctrine and the public interest in modifying the gift so that it does not fail and the public can continue benefiting from it).

O'Keefe.¹¹⁸ Under the agreement, the two institutions would share the expenses of maintaining the collection and alternately exhibit the collection.¹¹⁹ O'Keefe, however, conditioned her gift with a restriction that Fisk University would never sell the collection and that the collection was to remain in the Fisk University Galleries.¹²⁰ The court granted *cy prè*s relief.¹²¹ In light of the University's dire financial condition, which rendered the University incapable of caring for and exhibiting the collection, the arrangement between Fisk University and Crystal Bridges most closely follows the donor's expressed intent.¹²² The court of appeals affirmed the trial court's decision to modify the no-sale condition on O'Keefe's gift.¹²³

The Tennessee Court of Appeals also addressed the use of proceeds from the sale of the donated collection.¹²⁴ The court held that Fisk University could use proceeds from the sale towards its immediate debt obligations, reversing the trial court's order for Fisk University to create an endowment for the care of the collection with the proceeds.¹²⁵ The appellate court reasoned that the imposition on the use of proceeds exceeded the scope of judicial authority under the *cy prè*s doctrine.¹²⁶

Non-profit corporation law is applicable to evaluate whether the particular use of an institution's assets is appropriate. The court in *In re Friends for Long Island's Heritage*¹²⁷ held that assets donated to a non-profit corporation for educational purposes could not be used towards paying off debts upon dissolution of the corporation.¹²⁸ The court found that donor intent trumped creditor claims, even in dissolution.¹²⁹

Courts have also applied the business judgment rule, or a similar standard, in cases challenging a museum's decision to sell items from

118. See *In re Fisk Univ.*, No. M2010-02615-COA-R3CV, 2011 WL 5966893, at *1-2 (Tenn. Ct. App. Nov. 29, 2011).

119. *Id.* at *1.

120. *Id.* at *5.

121. See *id.* at *8.

122. *Id.* at *5-8.

123. *Id.* at *8.

124. *Id.*

125. See *id.* at *12.

126. See *id.* at *11.

127. 911 N.Y.S.2d 412 (N.Y. App. Div. 2010).

128. See *id.* at 417 (applying N.Y. NOT-FOR-PROFIT CORP. LAW § 513 (2010) & N.Y. EDUC. LAW § 220 (McKinney 2009)).

129. *Id.* at 420 (applying N.Y. NOT-FOR-PROFIT CORP. LAW §§ 513(b), 1002-a(c)(1) (2010)).

its collection.¹³⁰ In *Dennis v. Buffalo Academy of Fine Arts*, the court held that the Albright-Knox Gallery's decision to sell its collection of Victorian antiquities and to use the sales proceeds to refocus the collection and the gallery on contemporary art was unreviewable under the business judgment rule.¹³¹ Similarly, a Pennsylvania court held that the Philadelphia Museum of Art had the right as trustee of a bequeathed collection to sell objects from the collection when the museum decided, after almost fifteen years of deliberation, that the sale "would best serve the interests of the collection as a whole."¹³² A California court held that the board of trustees of the Pasadena Art Museum has broad discretion in managing the affairs of the museum, including what art to deaccession, so long as the trustees act in good faith and exercise reasonable care.¹³³ It has been difficult, however, for courts to develop a uniform standard for evaluating deaccessioning decisions.¹³⁴

3. Current and Proposed State Legislation

Despite the trend toward self-regulation as well as AAM's and AAMD's promulgation of ethical guidelines beginning in the 1980s, government actors began to step in to establish deaccessioning guidelines in the mid-2000s.¹³⁵ At present, New York is the only state to have a codified deaccessioning policy for museums.¹³⁶ Initially, the New York State Board of Regents enacted regulations against the use of sales proceeds for anything but future art acquisitions. Since then, legislators have proposed changes to the state education law to prohibit the use of deaccessioning sales proceeds for institutional operating costs.

130. See generally Jason R. Goldstein, Note, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 213–18 (1997) (endorsing the application of the business judgment rule to museum director decisions and only codifying a standard of conduct as opposed to limiting directors' freedom of action).

131. No. 2007-2220, 2007 WL 8409976, at *1 (N.Y. Sup. Ct. 2007).

132. *Wilstach Estate*, 1 Pa. D. & C.2d 197, 206 (1954).

133. *Rowan v. Pasadena Art Museum*, Case No. C 322817 (Cal. Super. Ct. 1981) (unpublished), reprinted in MERRYMAN, *supra* note 107, at 1282, 1285–86.

134. For in-depth discussions on the fiduciary duties of museum boards and directors, see Gerstenblith, *supra* note 75. Sue Chen, *Art Deaccessions and the Limits of Fiduciary Duty*, 14 ART ANTIQUITY & L. 103 (2009) and White, *OK to Sell*, *supra* note 31, offer insight into whether courts should uniformly apply trust standards of fiduciary duty to deaccession decisions.

135. Burgess & Shane, *supra* note 95, at 179.

136. Cirigliana, *supra* note 10, at 379.

a. *New York State Board of Regents Rules*

In New York State, the Board of Regents of the Department of Education charters museums as educational institutions.¹³⁷ Museums risk losing their Board of Regents charters if they violate any of the rules and regulations of the Board of Regents.¹³⁸ The Board of Regents regulations relating to museum collections (Regents Rules), effective May 2011, restrict the use of deaccessioning sales proceeds to new acquisitions, prohibiting the use of any part of the collection as collateral for a loan and the use of deaccessioning sales proceeds for operating costs.¹³⁹ The Regents Rules define deaccessioning as “(i) removing an object from an institution’s collection, or (ii) the act of recording/processing a removal from an institution’s collection.”¹⁴⁰ The Regents Rules state that a decision to deaccession is appropriate only if the decision satisfies at least one of the provided criteria.¹⁴¹

137. N.Y. EDUC. LAW § 216 (McKinney 2011) (“[The regents] may incorporate any . . . museum . . . whose approved purposes are, in whole or in part, of educational or cultural value deemed worthy of recognition and encouragement by the university.”). For example, the Chelsea Art Museum in New York risked revocation of its charter when it pledged as collateral for a loan works from its permanent collection. The museum needed the loan to make its mortgage payments. Erica Orden & Craig Karmin, *Chelsea Museum Risks Losing Charter*, WALL ST. J. (Aug. 10, 2010), <http://online.wsj.com/article/SB10001424052748703428604575419751923867136.html>.

138. *E.g.*, New York State Board of Regents, Statement on the Governance Role of a Trustee Board Member 1 (May 2010), *available at* <http://www.regents.nysed.gov/about/stmt07.pdf>.

139. N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27(c)(6)(e)(v)–(vii) (McKinney 2011) (providing that items in the collection may not be used as collateral for a loan and may not be capitalized, and that proceeds derived from deaccessioning may only be used for future acquisitions and may never be used for operating expenses); *see also* Robin Pogrebin, *Board of Regents Limits Museum Sales*, N.Y. TIMES, May 18, 2011, at C3 (reporting that the Board of Regents made permanent a set of emergency regulations instated in 2008, which prohibited museums from selling artworks for operating costs).

140. N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27(a)(10) (McKinney 2011).

141. Subsection (c)(7) Deaccessioning of Collections states:

An institution may deaccession an item in its collection only in a manner consistent with its mission statement and collections management policy and where one or more of the following criteria have been met: (i) the item is inconsistent with the mission of the institution as set forth in its mission statement; (ii) the item has failed to retain its identity; (iii) the item is redundant; (iv) the item’s preservation and conservation needs are beyond the capacity of the institution to provide; (v) the item is deaccessioned to accomplish refinement of collections; (vi) it has been established that the item is inauthentic; (vii) the institution is repatriating the item or returning the item to its rightful owner; (viii) the institution is returning the item to the donor, or the donor’s heirs or assigns, to fulfill donor restrictions relating to the item which the institution is no longer able to meet; (ix) the item pre-

This requirement makes the Regents Rules stricter than the standards established by the AAM and AAMD, which only suggest that museums should consider similar criteria.¹⁴²

The Regents Rules, as they now stand, originated in 2008 as an emergency amendment in response to the plans of some New York museums in desperate financial situations to sell portions of their collections to raise funds for operating costs.¹⁴³ In fact, the original proposal in 2008 would have allowed museums to sell paintings to pay for debts and avoid bankruptcy and dissolution.¹⁴⁴ The proposal, however, did not pass. Instead, the approved temporary amendment prohibited museums from using their collections as collateral for loans and selling their collections to pay debts.¹⁴⁵ The ad hoc advisory committee on deaccessioning emphasized the need for the Regents Rules to clarify deaccessioning policy rules for New York State museums.¹⁴⁶ Based on the concern that “[e]ven if a museum fails we want to keep collections in the public trust and not lose them to debt or insolvency,”¹⁴⁷ the Board of Regents voted to disallow museums from using their collections as a means for escaping debt or insolvency.¹⁴⁸ The Board of Regents began with the intention to provide mu-

sents a hazard to people or other collection items; and/or (x) the item has been lost or stolen and has not been recovered.

Id. § 3.27(c)(7).

142. Amy Goldrich, *Museum Deaccessioning in NY State*, ENTMT, ARTS & SPORTS L. BLOG (May 20, 2011, 11:16 AM), http://nysbar.com/blogs/EASL/2011/05/test_post.html.

143. For instance, Fort Ticonderoga, a historic site in upstate New York, wanted to sell artworks to fill a \$2.5 million gap in its budget. Robin Pogrebin, *Bill Seeks to Regulate Museums' Art Sales*, N.Y. TIMES, Mar. 18, 2009, at C1 [hereinafter Pogrebin, *Bill Seeks to Regulate*].

144. Memorandum from Jeffery W. Cannell, Deputy Comm'r for Cultural Educ., to Cultural Educ. Comm., re: Emergency Amendment of Regents Rule § 3.27, Relating to Museum Collections Mgmt. Policies (Dec. 1, 2008), *available at* <http://www.regents.nysed.gov/meetings/2008Meetings/December2008/1208cea3.htm> [hereinafter Dec. 2008 Regents Meeting].

145. *Id.*

146. Memorandum from Jeffery W. Cannell, Deputy Comm'r for Cultural Educ., to Bd. of Regents of New York, re: Amendment of Regents Rule § 3.27, Relating to Museum Collections Mgmt. Pol'ys. (May 5, 2011), *available at* <http://www.regents.nysed.gov/meetings/2011Meetings/May2011/511brca3revised.pdf> [hereinafter May 2011 Regents Meeting].

147. *Id.* New York Education Law already restricts the use of deaccessioning funds on the New York State Museum, a state-run museum. N.Y. EDUC. LAW § 233-a (McKinney 2009). Originally, this statute restricting the New York State Museum was to apply to all museums. Goldstein, *supra* note 130, at n.159.

148. *See* May 2011 Regents Meeting, *supra* note 146.

seums in financial straits with a means to survive, but instead focused restrictions on keeping museum collections intact.¹⁴⁹

b. Proposed New York State Legislation

In response to attempts of many museums to turn to their collections as financial resources in the mid-2000s, New York Assemblyman Richard Brodsky and Senator Jose M. Serrano introduced Assembly Bill 6959 (Brodsky Bill) to the New York Assembly in 2009.¹⁵⁰ Assemblyman Brodsky was intensely concerned with the museums' disregard for their responsibilities to the public trust.¹⁵¹ He sought to amend New York State education laws to protect the public interest in museum collections.¹⁵² The Brodsky Bill, which parallels the deaccessioning policies promulgated by AAM and AAMD, seeks to protect "the integrity and existence of museum collections handed to us by earlier generations as a sacred cultural and ethical trust."¹⁵³ The Brodsky Bill limits the circumstances under which deaccessioning is appropriate and prohibits the use of funds gained for anything except the future acquisition of artworks.¹⁵⁴ The bill, like the AAM and AAMD ethical codes, expressly prohibits the funding of "traditional and customary operating expenses" through sales from the museum's collection.¹⁵⁵

Unlike the Regents Rules, which only apply to museums chartered by the Board of Regents, the amended education law would apply to all museums in the state, regardless of their charter.¹⁵⁶ Thus, muse-

149. See Dec. 2008 Regents Meeting, *supra* note 144.

150. Assemb. B. 6959-A, 232d Sess. (N.Y. 2009). Deaccessioning events that motivated the submission of the Brodsky Bill to the New York Assembly include those of the National Academy of Art, *supra* notes 110–15 and accompanying text, the Rose Museum at Brandeis University, *infra* note 188 and accompanying text, and Fort Ticonderoga, *supra* note 143 and accompanying text.

151. Pogrebin, *Bill Seeks to Regulate*, *supra* note 143.

152. *Id.* The current education law addresses policies for museums chartered by the Board of Regents. EDUC. § 233-aa. The Brodsky Bill proposes adding § 233-aaa, which delineates accessioning and deaccessioning policies. Assemb. B. 6959-A § 2.

153. Assemb. B. 6959-A § 1.

154. *Id.* § 2.

155. *Id.* In an earlier form, the bill would have required that "[a]ny museum disposing of an item must make a good faith effort to sell or transfer such item to another museum in New York state," or otherwise a "good faith effort to sell or transfer such item to another public museum." N.Y.S. Legis. Drafting Comm'n 10608-01-9, 232d Legis. Sess. § 233-aaa (9) (N.Y. 2009), available at <http://graphics8.nytimes.com/packages/pdf/arts/03182009-bill.pdf>.

156. See Robin Pogrebin, *Institutions Try to Slow Bill to Curb Sales of Art*, N.Y. TIMES, June 23, 2009, at C1 [hereinafter Pogrebin, *Bill to Curb Sales*].

ums in New York State such as the Metropolitan Museum of Art and the National Academy of Art, which were created under state legislative charters before the Board of Regents was formed, are not subject to Regents Rules.¹⁵⁷ The bill would affect all museums, and any institution that falls under the bill's definition of "collecting institution," in New York State.¹⁵⁸ Following criticism from the museum and art communities and withdrawal of Senator Serrano's support, the bill stalled in the New York legislature¹⁵⁹ but has since been reintroduced in January 2011.¹⁶⁰

II. EVALUATING THE PROHIBITIONS ON THE USE OF DEACCESSIONING PROCEEDS

Deaccessioning policies, as discussed in Part I.C, dictate whether a deaccession is appropriate and how museums may use the proceeds derived from the sale of deaccessioned art. Museums now face an incongruous mixture of policies regarding their collections developed by their professional organizations, judicial decisions, and state legislation.¹⁶¹ The opposing views on what restrictions or guidelines deaccessioning policies should provide are the result of different interpretations of the museum's mission and the public trust.¹⁶² Museums are dealing with a critical ethical and legal conflict because, on the one hand, multiple deaccessioning policies are being thrust upon them, and on the other, there is a disagreement as to how museums should fulfill their duty to the public.¹⁶³

157. The Metropolitan Museum of Art and the National Academy of Art were chartered before 1889, the year the Board of Regents was founded and imbued with the authority to charter educational institutions. Kimberly Pallen, *Museum Deaccessioning: Will the Proposed Bill Have a Significant Impact?*, N.Y. COUNTY LAWYER, Mar. 2010, at 5.

158. The proposed legislation defines a collecting institution as one that "is operated by a governmental entity, education corporation, not-for-profit corporation or charitable trust and owns or holds collections, or has collecting as a stated purpose in its charter, certificate of incorporation or other organizing documents, or intends to own or hold collections." Assemb. B. 6959-A §2.

159. Robin Pogrebin, *Bill to Halt Certain Sales of Artwork May Be Dead*, N.Y. TIMES, Aug. 10, 2010, at C1 [hereinafter Pogrebin, *Bill to Halt Sales*].

160. Assemb. B. 3957, 234th Sess. (N.Y. 2011). The bill is sponsored by Assemblyman Engelbright. *Id.*

161. See Fincham, *supra* note 74, at 2 ("At present museums dispose of works without the benefit of a clear set of laws or guiding norms.").

162. See *supra* Part I.B.

163. Millions of dollars and important civic institutions are at stake in the most publicized deaccessioning scandals. See Kearns, *supra* note 20.

Part II.A questions who—museums, courts, or legislators—should create and enforce a deaccessioning policy on museums. Part II.B analyzes the arguments advocating for or against deaccessioning and the use of deaccessioning sales proceeds for operating costs.

A. Dictating Deaccessioning Policies: Whose Role?

This Section evaluates the different sources of deaccessioning policies. The New York State legislature is encroaching on an area that the New York State Attorney General had previously ceded to museums to regulate on their own.¹⁶⁴ Courts have had little opportunity to address and develop clear precedents for deaccessioning issues.¹⁶⁵ Museum professional organizations, courts, and state legislatures approach deaccessioning and the museum's related concerns from different perspectives. Each group has its own relationship with, understanding of, and influence over the museum community. These factors all have a bearing on the effectiveness of each group's governance of museums.

1. Museum Professional Organizations

Ethics codes promulgated by museum professional organizations have effectively implemented deaccessioning policies for museums. Since 1973, when New York State Attorney General Louis Lefkowitz chose to foster self-regulation within the museum community, rather than impose legislation, self-regulation had been the status quo.¹⁶⁶ Self-regulation underscores the tradition that American museums are predominantly private organizations.¹⁶⁷ Museums self-regulate by promulgating codes of ethics through their member-based professional organizations and by each museum developing and abiding by its own collections management policies to address the unique needs of its organization.¹⁶⁸

The leadership of organizations like AAM and AAMD is composed of museum professionals from their diverse member institutions.¹⁶⁹ Supporters of self-regulation argue that deaccessioning and

164. See Burgess & Shane, *supra* note 95, at 172.

165. See *supra* Part I.C.2.

166. Burgess & Shane, *supra* note 95, at 172.

167. See, e.g., Wood, *Authorities*, *supra* note 21, at 116 (stating that museums are “fundamentally . . . self-regulated”).

168. See Burgess & Shane, *supra* note 95, at 172–73.

169. *AAM Governance*, AM. ASS'N OF MUSEUMS, <http://www.aam-us.org/about/aam/governance/index.cfm> (last visited Feb. 24, 2012); AAM CONSTITUTION art. 4, §

collections management decisions are best made by museum professionals; museum staff should be able to exercise their expertise and address the specific needs of the organization.¹⁷⁰ The AAMD also recognizes that the mission, internal structure, and particular circumstances of museums can affect how principles of collections management should apply to that museum.¹⁷¹ Supporters of self-regulation contend that the museum staff's discretion is greatly diminished if they are bound to rules that apply to one of their responsibilities, maintaining a collection, to the detriment of another, operating a museum that is open to the public with exhibitions and educational programming.¹⁷² Finally, the professional organizations enforce their standards very strictly, mainly through the threat of social stigma within the museum community, revocation of membership, or the imposition of sanctions.¹⁷³

There are drawbacks, however, to relying on professional standards to enforce deaccessioning policies. Professional standards lack legal force and hinge on voluntary compliance.¹⁷⁴ Membership with a professional organization is voluntary, and museums can rescind their membership and no longer be subject to such standards.¹⁷⁵ Institutions elect to be members of one or more of the several professional organizations and to be bound by the standards and codes of those organizations.¹⁷⁶ Although AAM's and AAMD's ethical codes and professional guidelines are highly influential in the museum field,

4 ; *About AAMD—Governance*, ASS'N ART MUSEUM DIRS., <http://www.aamd.org/about/#Governance> (last visited Mar. 1, 2012).

170. Pogrebin, *Bill to Curb Sales*, *supra* note 156.

171. See AAMD PROF'L PRACTICES, *supra* note 18, at 4; Ildiko Pogany DeAngelis, *Collections Ethics*, in MUSEUM REGISTRATION METHODS 399, 401 (Rebecca A. Buck & Jean Allmam Gillmore eds., 5th ed. 2011) ("Given the broad range of collecting organization that are its members, the AAM Code expects individual museums to promulgate their own codes to suit the needs of their collections and organization types.").

172. See Pogrebin, *Bill to Curb Sales*, *supra* note 156. For example, the AAMD recognizes that "[a]n art museum is a[n] . . . institution—essentially educational and humanistic in purpose—that studies and cares for works of art and . . . exhibits and interprets them to the public." AAMD PROF'L PRACTICES, *supra* note 18, at 4.

173. See *supra* notes 110–15 and accompanying text (describing the experience of the National Academy of Art in 2009).

174. *E.g.*, MALARO, LEGAL PRIMER, *supra* note 52, at 230 ("Law can be enforced, whereas ethical codes (at least in the museum field) depend on voluntary compliance."); White, *OK to Sell*, *supra* note 31, at 1046 n.22.

175. See *supra* note 98.

176. See, *e.g.*, *AAM Standards and Best Practices for U.S. Museums*, AM. ASS'N OF MUSEUMS, <http://www.aam-us.org/aboutmuseums/standards/> (last visited Feb. 24, 2012).

they may not be adequate in enforcing and holding museums accountable if there is no independent professional body to monitor whether museums are complying.¹⁷⁷ The social stigma associated with violations of AAM and AAMD codes effectively results in forcing all museums to follow the standards, whether or not they are members of or accredited by the organization, if only to avoid public scrutiny.¹⁷⁸

2. Judicial Analysis

Courts can evaluate museum deaccessioning decisions on a case-by-case basis, taking into account such factors as the decision-making process of museum directors, the exigencies of the museum's need for funds, and the intended use of the funds.¹⁷⁹ Individualized review of museum deaccessioning cases would address the diversity of museums and the variety of difficulties each museum may encounter.¹⁸⁰ The deaccessioning cases show, however, that the law is unclear on the specific issue of using deaccessioning proceeds for a museum's operating costs, and courts have not set a clear framework of analysis.¹⁸¹

The results of the cases discussed in Part I.C.2 suggest that courts are willing to allow museums some discretion regarding deaccession and the use of deaccessioning sales proceeds.¹⁸² This allowance is probably spurred by the dire circumstances museums are in by the time their cases arrive in court.¹⁸³ Therefore, the cases that go to trial might not paint a full picture of the challenges brought against museum deaccessions because of standing requirements and the high cost of litigation.¹⁸⁴

177. DeAngelis, *supra* note 171, at 402.

178. *See id.* (citing peer pressure within the profession as the only means of enforcing AAM's ethics policies); *see also* Chen, *supra* note 134, at 134.

179. *See, e.g.,* Rowan v. Pasadena Art Museum, No. C 322817 (Cal. Super. Ct., L.A. County, Sept. 22, 1981) (unpublished opinion), reprinted in MERRYMAN, *supra* note 107, at 1282; *In re* Friends for Long Island's Heritage, 911 N.Y.S.2d 412 (N.Y. App. Div. 2010); Dennis v. Buffalo Academy of Art, 836 N.Y.S.2d 498 (N.Y. Sup. Ct. 2007); Wilstach Estate, 1 Pa. D. & C.2d 197, 206-08 (1954); *In re* Fisk Univ., No. M2010-02615-COA-R3CV, 2011 WL 5966893 (Tenn. Ct. App. Nov. 29, 2011).

180. *See supra* Part I.A.1.

181. *See* cases cited *supra* note 179; *see also* White, *OK to Sell*, *supra* note 31, at 1045-46 & nn.22-23 (explaining that, for the few court cases dealing with deaccessioning, judges have not provided "insight into their decision-making processes and, as a result, offer no direction for future applicability.>").

182. *See* MALARO, LEGAL PRIMER, *supra* note 52, at 232.

183. *Id.*

184. Standing to bring a case against museums for deaccessioning decisions is very limited and there is no clear rule on the issue. *See* Sugin, *supra* note 33, at 550 ("[A] university [with respect to its museum] cannot be sure that its decision to sell some

State Attorneys General are heavily involved in many deaccessioning cases that make their way into courts.¹⁸⁵ State Attorneys General are responsible for overseeing institutions that are set up for the public benefit.¹⁸⁶ As such, they have standing to bring a case against a museum (or any charitable trust) for failing to achieve the museum's charitable purpose.¹⁸⁷ Donors, heirs of donors, and members of museums have also been able to sue museums, seeking injunctions on the sale of artwork.¹⁸⁸ One court held, however, that city taxpayers and the general public lacked standing to sue the trustees of an art museum charitable trust.¹⁸⁹ Financing and standing issues greatly hinder the ability of parties other than the State Attorneys General to sue museums.¹⁹⁰

Relying on the State Attorneys General to bring actions against museums or to challenge museum petitions to sell or transfer artwork presents problems as well. If the attorneys general play a predomi-

(or all) of the university's art collection will withstand legal challenge. The university cannot even predict who will be allowed to oppose its decision, and there is no reason to believe that courts will settle this issue any time soon."). Furthermore, some state laws require not-for-profit corporations to petition the courts when deciding to sell "substantially all" of its assets. See N.Y. NOT-FOR-PROFIT CORP. LAW § 511 (McKinney 2011).

185. See *In re Fisk Univ.*, No. M2010-02615-COA-R3CV, 2011 WL 5966893, at *6 (Tenn. Ct. App. Nov. 29, 2011) (describing the Tennessee Attorney General's arguments against the sale of the fifty percent interest in the art collection because the sale would result in harm to the Nashville public); *supra* notes 120-125 and accompanying text (discussing *In re Fisk University*).

186. *E.g.*, *Hardman v. Feinstein*, 240 Cal. Rptr. 483, 485 (Cal. Ct. App. 1987); MALARO, LEGAL PRIMER, *supra* note 52, at 22-26.

187. *E.g.*, 240 Cal. Rptr. At 485; *People ex rel. Scott v. George F. Harding Museum*, 374 N.E.2d 756 (Ill. App. Ct. 1978); MALARO, LEGAL PRIMER, *supra* note 52, at 22-26.

188. Donors and their heirs to the Rose Museum at Brandeis University sued for an injunction when Brandeis officials announced that they would sell the Rose's art collection and close the museum for university operating costs. See, e.g., Kearns, *supra* note 20, at 227. The Georgia O'Keefe Museum intervened in *In re Fisk University* as the beneficiary of residual interests in Georgia O'Keefe's gift to Fisk University. The court, however, held that they lacked standing. *Georgia O'Keefe Found. v. Fisk Univ.*, 312 S.W.3d 1, 1 (Tenn. Ct. App. 2009). An alumni association of Randolph College sued for a preliminary injunction to block the sale of paintings by the university's Maier Museum of Art to raise funds for the college's general budget. Laura R. Katzman & Karol A. Lawson, *Lessons from a Deaccession*, MUSEUM, (Jan.-Feb. 2009), available at <http://www.aam-us.org/pubs/mn/deaccession.cfm>. The plaintiffs successfully obtained an injunction, but on the condition that they post a one million dollar surety bond. The plaintiffs failed to raise the funds, the injunction was lifted, and the sale of the paintings went through. Kearns, *supra* note 20, at 221-23.

189. *Hardman*, 240 Cal. Rptr. at 485-86 (Cal. Ct. App. 1987)

190. See *supra* note 188.

nant role in overseeing and challenging museum actions, there is some doubt about the ability of these offices to fulfill the role effectively.¹⁹¹ There are a variety of critical public interests, such as the vast number of museums and other charitable organizations within an Attorney General's jurisdiction as well as the social influence exerted by the trustees of many of these charitable organizations, that will hinder the ability of the State Attorneys General to monitor museums.¹⁹² Limitations on standing and cases actually brought to trial do not present a thorough view of judicial analysis of deaccessioning issues.¹⁹³

If there was a comprehensive judicial approach to analyzing deaccessioning decisions,¹⁹⁴ then museums could anticipate whether the courts would uphold their actions. Some scholars and commentators advocate for courts to apply a higher standard of fiduciary duties in reviewing museum decisions.¹⁹⁵ They argue that the higher standard of fiduciary duties imposed on trusts is appropriate for collections management decisions because trust law emphasizes complete loyalty to the interests of the public beneficiaries.¹⁹⁶ Museum boards, they suggest, can meet this higher standard if they establish procedures to which they adhere in their deaccessioning decisions.¹⁹⁷

Commentators have also recommended an arbitral review of deaccessioning decisions when the museum plans to sell the artwork and use the proceeds for operating costs.¹⁹⁸ An impartial decision-maker, whether in the court system or private arbitration, would be able to assess the museum, the museum's fundraising efforts, its financial standing, its public, and the collection as a whole, as well as

191. Stephen E. Weil, *Breaches of Trust, Remedies, and Standards in the American Private Art Museum*, in *BEAUTY AND THE BEASTS: ON MUSEUMS, ART, THE LAW, AND THE MARKET* 160, 166 (1983) [hereinafter Weil, *Breaches of Trust*].

192. *Id.*

193. See White, *OK to Sell*, *supra* note 31, at 1045–46 & nn.22–23.

194. Currently, the courts have not developed a comprehensive approach to address these issues. See *supra* notes 181–89 and accompanying text.

195. *E.g.*, Chen, *supra* note 134; Cirigliana, *supra* note 10 (advocating for applying a higher fiduciary duty standard on transactions involving investments of museum funds); Gerstenblith, *supra* note 75; White, *OK to Sell*, *supra* note 31 (advocating for the application of trustee fiduciary duties by courts, regardless of whether the museum is a charitable trust or non-profit corporation, to analyze deaccessioning decisions).

196. *E.g.*, White, *OK to Sell*, *supra* note 31, at 1058.

197. Chen, *supra* note 134, at 105–06.

198. Judith Dobrzynski, Op-Ed., *The Art of the Deal*, N.Y. TIMES, Jan. 1, 2010, at A21.

professional codes of ethics, to evaluate the actions of the museum.¹⁹⁹ Thus, while courts could assess decisions on a case by case basis, the standards are unclear, the evaluation is after the fact, and few parties have standing or means to sue.

3. State Legislatures

Some commentators believe that state legislation is the appropriate means to regulate museums because of the deep public interest in museums.²⁰⁰ For one, museums are able to pursue their missions to collect and exhibit our artistic heritage because they receive government support through tax benefits and direct funding.²⁰¹ Additionally, where courts address deaccessioning on a case by case basis, legislation could create and enforce a comprehensive standard for deaccessioning and use of proceeds.²⁰² State legislation applicable to all organizations that collect or hold art and cultural artifacts regardless of their legal structure or stated purpose can deliver this comprehensive framework.²⁰³

A significant aspect of having a deaccessioning rule enforced by the state is the protection of the state's interest in keeping art collected by its institutions within the state.²⁰⁴ The way in which a State Attorney General represents the state's and the public's interests²⁰⁵ in challenging a museum's decision to deaccession reveals some of the effects of adopting this position in the legislative scheme. The State Attorney General is frequently concerned with retaining the collection within the city or state in which the museum is located.²⁰⁶ In the fall of 2011,

199. *Id.*

200. See generally David R. Gabor, Comment, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, 36 UCLA L. REV. 1005 (1989) (arguing that because museums receive direct and indirect government subsidies, state regulation of museum procedures is appropriate).

201. *Id.* at 1007.

202. See Sugin, *supra* note 33, at 550–51 (“While courts might be the best institutional choice for resolving the issue, they have little opportunity to comprehensively address it. Consequently, legislation might be necessary to create the proper standard for deaccessioning decisions, without resort to litigation in every case.”).

203. *Id.*

204. Assemb. B. 6959-A, 232d Legis. Sess. §1 (N.Y. 2009).

205. *Our Office*, N.Y. STATE ATT’Y GEN., <http://www.ag.ny.gov/our-office> (last visited Feb. 24, 2012).

206. *E.g.*, *In re Fisk Univ.*, No. M2010–02615–COA–R3CV, 2011 WL 5966893, at *1–*2 (Tenn. Ct. App. Nov. 29, 2011) (describing the Tennessee Attorney General’s involvement in bringing a case against Fisk University’s planned sale of art to an Arkansas museum, Crystal Bridges Museum of American Art); Taylor, *Considers Clos-*

the Folk Art Museum considered closing and dissolving after defaulting on a \$31.9 million loan and depleting reserves for operating funds.²⁰⁷ The museum was required to get the approval of the Attorney General's office for decisions concerning the dissolution of the museum and transfer of its collection.²⁰⁸ If the museum donated the collection to another public institution, the Attorney General's office wanted to maintain the cultural value of the museum's collection to the New York community.²⁰⁹ Therefore, although the Smithsonian Institution in Washington, D.C. might have had better resources to care for the Folk Art Museum's collection, the New York Attorney General's office considered transferring the collection to the Brooklyn Museum of Art, even though the Brooklyn Museum had been experiencing financial difficulties itself.²¹⁰ Maintaining art in a geographic range, rather than looking at who can best care for the art, might serve as a better focus.²¹¹ Similarly, the emphasis of state legislation on the retention of artworks in museums within the state could be detrimental to the preservation of and access to the artworks, even if it values the state's interest in having the artworks in its jurisdiction.²¹²

Even if the museum field cannot agree on what a universal policy should be, some commentators contend that, if the legislature has decided that it is in the public interest to implement specific restrictions and limitations with respect to museum collections, then the museum field will have to adapt and comply.²¹³ Moreover, "[w]hen museums

ing, supra note 2 (describing the New York Attorney General's involvement in the Folk Art Museum's contemplated closure).

207. See Boroff & Kazakina, *supra* note 4.

208. Taylor, *Considers Closing, supra* note 2; see also Smith, *Museum Teeters, supra* note 2.

209. Smith, *Museum Teeters, supra* note 2.

210. *Id.*

211. The Attorney General in the Fisk University case similarly was more concerned with keeping the donated collection in Nashville than allowing another museum who has the means to care for the art to own it. See *In re Fisk Univ.*, 2011 WL 5966893, at *1–*2.

212. See Fincham, *supra* note 74, at 5 (noting that a museum cannot serve the public interest if it is "unable to afford to pay its staff, or remain open[,] or keep admission prices low").

213. See Lee Rosenbaum, *Expediency Trumps Policy: More on NYS Regents' Deaccessions Flip-Flop UPDATED*, CULTUREGRRRL (Sept. 16, 2010, 2:26 PM), http://www.artsjournal.com/culturegrrl/2010/09/more_on_nys_regents_deaccessio.html ("Since when do the regulators take action based on the consensus of the parties to be regulated? It stands to reason that museums would not favor being saddled with tighter restrictions. The appropriate question is NOT whether the targets of regula-

cross too many lines, the public's elected representatives must step in."²¹⁴

There are arguments, however, against the one size fits all model in regulating deaccessioning. First, legal obligations generally delineate the minimum standards that must be satisfied, while professional ethical standards mandate the highest standards toward which one should strive.²¹⁵ The Brodsky Bill adopted the professional standards and, as a result, might be overreaching.²¹⁶ Second, museums do not operate as a collective whole.²¹⁷ All museums have similar missions to collect, preserve, and provide access to cultural knowledge.²¹⁸ Indeed, they have formed professional organizations and networks to share best practices with each other and loan objects and exhibitions to one another.²¹⁹ Each museum, however, frames its collecting and exhibition missions differently, and categorizes and interprets its collection in a different light.²²⁰ Each is a separate, private organization, generally funded by different people, and visited by different communities.²²¹ Thus, a broad based legislative approach to protecting the public trust of museum collections in the state could hurt museums more than it helps the public trust.²²²

B. Examining Trends in Deaccessioning Positions

The elusive definition and scope of the public trust fuels both sides of the deaccessioning debate. Commentators question whether a museum that has no option but to sell artwork for operating funds should be allowed to sell the artwork and use the proceeds to remain open; some suggest that it would be preferable for the museum to close its

tion agree that new rules are a good idea. It's whether there is an important public purpose to be served by new rules.").

214. Rosenbaum, *For Sale*, *supra* note 15.

215. MALARO, LEGAL PRIMER, *supra* note 52, at 230.

216. *Compare* AAM CODE, *supra* note 18, *with* Assemb. B. 6959-A, 232d Legis. Sess. (N.Y. 2009).

217. *See supra* notes 24–28 and accompanying text.

218. *See* AAM CODE, *supra* note 18; AAMD PROF'L PRACTICES, *supra* note 18; ICOM CODE, *supra* note 100.

219. AAM CODE, *supra* note 18, AAMD PROF'L PRACTICES, *supra* note 18, AAMD PROF'L PRACTICES, *supra* note 18.

220. *See supra* notes 39–43 and accompanying text.

221. *See supra* notes 46–48 and accompanying text.

222. Burgess & Shane, *supra* note 95, at 173 (noting that museum community leaders worried that a legislative policy would "result in unintended consequences hindering the ability of some museums to operate in an effective manner").

doors rather than use artwork as a financial asset.²²³ The answer to these questions depends on how one analyzes deaccessioning and the responsibilities of the museum in the context of the public trust, as described in Part I.B. Institutions that seek to use their collections as a source of operating funds, and their critics, have different interpretations of the nature of the public interest in those collections.²²⁴ Within the deaccessioning debate, there are three primary positions: one holds that deaccessioning is not an option for museums; the second allows for certain deaccessions if the use of proceeds is restricted to future acquisitions for the collection; the third view posits that deaccessioning and using sales proceeds for operating expenses can be beneficial for museums and the public.²²⁵

Part II.B.1 explores the reasoning for absolute prohibitions against deaccessioning. Part II.B.2 identifies the claims for a restrained approach to deaccessioning. Part II.B.3 examines the arguments for a

223. Tyler Green, *Failure is an Option*, MODERN ART NOTES (Jan. 5, 2009, 11:06 AM), <http://blogs.artinfo.com/modernartnotes/2009/01/failure-is-an-option/> [hereinafter Green, *Failure*] (“If an institution . . . can’t operate effectively enough to stay open, it should close . . . There is no reason that a failed institution should have nine lives. When they’ve failed, they’ve failed.”); cf. Amy Rogers Nazarov, *Death with Dignity*, MUSEUM, Jul.–Aug. 2009, available at <http://www.aam-us.org/pubs/mn/dw/dignity.cfm> (“[E]ven the most vociferous outcry from laypersons and professionals alike cannot save an institution whose financial outlook has gone from poor to bleak.”). But see Dobrzynski, *supra* note 198 (“If the choice is between allowing a museum to fail (or make crippling cutbacks) and selling some art, what’s the big deal? Sell art!”); Jori Finkel, *Whose Rules Are These, Anyway?*, N.Y. TIMES, Dec. 28, 2008, at AR28 (“Even Patty Gerstenblith, a law professor at DePaul University in Chicago known for her strong stance on protecting cultural patrimony, said her position had softened over the years. ‘If it’s really a life-or-death situation, if it’s a choice between selling a Rauschenberg and keeping the museum doors open, I think there’s some justification for selling the painting.’”). See generally Sergio Muñoz Sarmiento, THE DEACCESSIONING BLOG, <http://clanco-theartdeaccessioningblog.blogspot.com> (last visited May 9, 2012).

224. Sugin, *supra* note 33, at 551–55 (noting that, particularly in the context of a university art collection, art has a hybrid nature as both cultural property and instrumental property); see also Finkel, *supra* note 223 (noting that the deaccessioning debate is really about “two competing visions of art: commodity versus educational tool . . . The people who wanted to sell the art were saying it’s the same thing as a truck or computer or a chair”) (quoting Karol Lawson, director of the Maier Museum at Randolph College).

225. Compare Canaday, *supra* note 63 (admonishing any reason for deaccessioning, even if the work “represents a curatorial idiocy”), and Rosenbaum, *For Sale*, *supra* note 15 (lamenting that deaccessioning sales are a sign that “we can no longer depend on our cultural institutions to protect and preserve the public patrimony”), with ASS’N OF ART MUSEUM DIRS., *supra* note 61 (allowing for carefully considered deaccessioning through transparent procedures), and AAM CODE, *supra* note 18 (permitting museums to deaccession solely for advancement of the museum’s mission).

broader approach to deaccessioning and the use of deaccessioning sales proceeds.

1. *The Deaccessioning Absolutist Position*

The deaccessioning absolutist would never allow an artwork in a museum collection to be taken out of the collection, as this work was given in trust to the museum to preserve for future generations.²²⁶ Arts journalist Lee Rosenbaum argues that museums, if they needed to deaccession, should transfer the artwork to other museums, rather than return the artwork to private hands.²²⁷ This way, an artwork is deaccessioned from a particular museum's collection, but it is never deaccessioned from the public trust.²²⁸ The fear, as Assemblyman Brodsky expressed, is that, if museums had free rein to sell from their collections, the world would be left with empty museums.²²⁹

The uproar in reaction to the Metropolitan Museum's decision to deaccession in 1973 highlights a fear of art returning to private hands where it would be, presumably, forever inaccessible to the public.²³⁰ John Canaday, a journalist at *The New York Times*, lambasted the Metropolitan Museum for deaccessioning several paintings to raise funds for a future purchase.²³¹ Canaday suggested that, because do-

226. Judith H. Dobrzynski, *Richard Armstrong Reveals His Inner Cowboy, Especially on Deaccessioning*, REAL CLEAR ARTS BLOG (May 28, 2009, 5:00 AM), http://www.artsjournal.com/realcleararts/2009/05/armstrong_interview.html ("I am not a deaccessioning absolutist. It has to be done in some cases.").

227. *E.g.*, Rosenbaum, *For Sale*, *supra* note 15 ("If an institution really has no use for certain works that are worthy of public display, it should give or lend them to other public institutions that would gladly show them.").

228. *See* Green, *Failure*, *supra* note 223 ("If an institution . . . can't operate effectively enough to stay open, it should close. Then it should disperse its collection to non-profit institutions—to other museums. This way art collections held in a public trust remain held in a public trust."). *But cf.* MALARO, LEGAL PRIMER, *supra* note 52, at 232–33 (discussing how the New York Attorney General devised an agreement with the New York Historical Society, which needed to deaccession much of its collection, whereby other New York museums could preempt winning bids on deaccessioned objects and receive the advantage of discounts and long-term payment plans).

229. Pogrebin, *Bill Seeks to Regulate*, *supra* note 143.

230. *See, e.g.*, Canaday, *supra* note 63 ("Any work of art offered for sale to the highest bidder can be lost to the public forever."). *But see* Finkel, *supra* note 223 (quoting Michael O'Hare, cultural policy professor at University of California, Berkeley, who suggests that smaller museums and even private collectors might be more likely to display the piece of art that another museum intends to sell). For further discussion on the Metropolitan Museum case, see *supra* notes 103–09 and accompanying text.

231. Canaday, *supra* note 63.

nors of artwork to museum collections receive tax benefits for their charitable gift, the public is effectively paying for the donated artworks and, as a result, the public owns them.²³² Canaday also contends that the income from selling an artwork, even income deemed minor, is “hardly worth the risk” that the artwork might become desirable in the future.²³³ Furthermore, others maintain that museum collections, built over generations through the contributions of donors, scholars, curators, and other museum supporters, reflect the history and scholarship of the collecting institution and dismantling the collection to any degree would undo years of hard work.²³⁴ For these proponents, even the seemingly innocuous and widely accepted purpose of refining the collection does not warrant an offer for sale that a private individual can accept as a “museum’s ‘redefining’ of its mission should be cause for moving works to other public institutions, not for their lucrative transfer into private hands.”²³⁵ Advocates of prohibiting all deaccessions hold that art has an intrinsic value that cannot be monetized, and they criticize the idea of removing any object from a museum’s collection, not to mention using sales proceeds for operating costs.²³⁶

2. *A Restrained Approach: A Compromise*

The AAM, AAMD, Regents Rules, and Brodsky Bill take a restrained position against deaccessioning and the use of proceeds for anything other than future acquisitions.²³⁷ This perspective allows for deaccessioning in limited circumstances, such as redundancy, poor quality or physical condition, when the museum’s possession is inconsistent with applicable law, or to refine the museum’s collection.²³⁸ As such, the focus is more on the use of deaccessioning sales proceeds rather than deaccessioning itself. Thus, this perspective holds that, as long as the museum has full title to the artwork it plans to sell,²³⁹ it is

232. *Id.*

233. *Id.*

234. Katzman & Lawson, *supra* note 188.

235. Rosenbaum, *For Sale*, *supra* note 15.

236. *See, e.g., id.* (stating that, in the context of using proceeds for future acquisitions, “[c]urators use such sales to bankroll their shopping sprees”); Canaday, *supra* note 63.

237. *See supra* Parts I.C.1, I.C.3.

238. *See, e.g.,* AAMD PROF’L PRACTICES, *supra* note 18; AAM CODE, *supra* note 18.

239. Donor restrictions on gifts of art to a museum can restrict whether the museum has the right to sell, or even deaccession, the donated artwork. *E.g.,* Gerstenblith,

acceptable for the museum to sell the artwork and to use proceeds to purchase new artworks or for the direct care of the collection.²⁴⁰

Additionally, a strict prohibition against using deaccessioning sales proceeds for anything except future acquisitions for the collection maintains the division between the museum's operating funds and its collection.²⁴¹ Significantly, museums do not list their collections as assets on their balance sheets.²⁴² It follows that proceeds from deaccessioning sales should not be used to balance liabilities on the museum's balance sheet, and the proceeds would stay in the collection.²⁴³

Furthermore, the position against deaccessioning invokes the maintenance of the public's trust in museums to support prohibiting deaccessioning. Limiting the use of deaccessioning sales proceeds to future acquisitions not only respects the formal separation of a museum's collection from its balance sheet, but also protects the public's trust and confidence in museums.²⁴⁴ The museum relies on donors and supporters for funding and for building its collections.²⁴⁵ Therefore, the argument is that selling artwork given as a gift or bequest for preservation in the museum collection ignores donor intent.²⁴⁶ If a museum consistently ignores the donor's intent for the use of the donation, donors and other museum supporters will become distrustful of the museum and rescind their future support.²⁴⁷ Restrictions on

supra note 75, at 188; *supra* notes 118–23 and accompanying text (discussing the deaccessioning case involving Fisk University).

240. AAM CODE, *supra* note 18; ASS'N OF ART MUSEUM DIRS., *supra* note 61. Some commentators go even further and would like to limit the use of the proceeds to purchases for the same department from which the artwork was sold. Judith H. Dobrzynski, *MoMA to Sell Tamayo Watermelons: A Word About Deaccessioning Policy*, REAL CLEAR ARTS BLOG (Oct. 18, 2011, 8:08 PM), http://www.artsjournal.com/realcleararts/2011/10/moma_sells_tamayo.html ("Some museums—the good ones—keep money raised by deaccessions within the department that is selling works.").

241. See Christopher Knight, *How Not to Deregulate Art Museums*, CULTURE MONSTER, L.A. TIMES (Apr. 7, 2009, 10:58 AM), <http://latimesblogs.latimes.com/culturemonster/2009/04/deregulating-deaccessioning-or-something.html>.

242. *Id.*; AAMD PROF'L PRACTICES, *supra* note 18, at 20.

243. See Knight, *supra* note 241.

244. See *supra* note 83 and accompanying text.

245. *E.g.*, Barker, *supra* note 25, at 23–25; Peter Temin, *An Economic History of American Art Museums*, in THE ECONOMICS OF ART MUSEUMS 179, 182 (Martin Feldstein ed., 1992).

246. *E.g.*, Katzman & Lawson, *supra* note 188.

247. See *id.* (describing how, upon hearing of plans to sell art from the museum collection, museum patrons informed the Maier Museum at Randolph College that they would change estate plans, cancel memberships, and withdraw gift promises);

the use of deaccessioning proceeds ward off the possibility of a conflict of interest on the part of directors and trustees who might benefit from applying proceeds to operating costs.²⁴⁸ The AAM and AAMD see restricting deaccessioning as a way of protecting the public interest in museums.²⁴⁹ The Board of Regents and Assemblyman Brodsky recognized a need to implement regulations and legislation to cement further the parameters within which museums must operate in order to maintain the public trust.²⁵⁰

3. *A Broader Perspective on Deaccessioning*

A third standpoint on deaccessioning is that deaccessioning is a common and necessary museum practice, but restricting the use of deaccessioning proceeds is too constraining for museums today.²⁵¹ The most recent criticism against the restrained approach focuses on the provisions of the Brodsky Bill.²⁵² The Brodsky Bill's bright line restriction on the use of deaccessioning proceeds dictates specific col-

see also DeAngelis, *supra* note 171, at 399 (positing that museums would lose support from donors and visitors if they lost the public's trust).

248. *See* Knight, *supra* note 241 (criticizing the view that deaccessioning sales proceeds could be used for any purpose as including "giving the staff a big raise" and "underwriting even a boffo night out with your chums on the board.") (internal quotation marks omitted).

249. *See* AAM CODE, *supra* note 18, at 3 ("[The] stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility, and responsible disposal.").

250. N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27 (2011); Assemb. B. 6959-A, 232d Legis. Sess. § 2 (N.Y. 2009).

251. *See* Finkel, *supra* note 223 (quoting National Academy director, Carmine Branagan, who was shocked that the AAMD responded so harshly to the National Academy's plan to sell art for operating funds, as if the National Academy had "committed some egregious crime").

252. *E.g.*, Letter from Alliance for the Arts, Hispanic Society of America, International Center of Photography, The Jewish Museum, Lincoln Center for the Performing Arts, Inc., Metropolitan Museum of Art, Museum of Modern Art, Nonprofit Coordinating Committee, Solomon R. Guggenheim Foundation, The Studio Museum of Harlem, The Vivian Beaumont Theater, Inc. d/b/a/ Lincoln Center Theater, Whitney Museum of American Art, Wildlife Conservation Society to Assemblyman Brodsky and Senator Serrano (Jun. 1, 2009), *available at* <http://www.scribd.com/doc/16081950/Letterdeaccessioningbrodsky>; Letter from New York City Bar Association Committee on Art Law to Assemblyman Brodsky (May 21, 2009), *available at* <http://www.scribd.com/doc/15831924/52109-Letter-to-AM-Brodsky-Re-Museum-Deaccessioning-Bill>.

lections management policies, focusing on the collecting mission of museums.²⁵³

First, proponents for a broader deaccessioning policy attack the deaccessioning absolutist's reliance on the museum as public trust argument.²⁵⁴ They argue that conceptualizing museums as repositories is an inaccurate reflection of what museums contribute to society.²⁵⁵ The Brodsky proposal focuses solely on the protection and expansion of museum collections.²⁵⁶ This conceptualization suggests that a museum is a static storehouse of cultural artifacts, objects that are revered, rightfully so, but to a fetishistic extent.²⁵⁷

Second, proponents of a broader deaccessioning policy argue that the limitation on the use of deaccessioning sales proceeds to future acquisitions contradicts the insistence on keeping art in the public trust for future generations.²⁵⁸ To illustrate, the Brodsky Bill concludes that monetization of selected objects from a collection undermines the existence of museums;²⁵⁹ however, a deaccession and disposition by sale requires, no matter the use of the sales proceeds, that

253. The Brodsky Bill only considers museums as "collecting institutions," and the definition of collecting institutions says nothing about public access to art. Assemb. B. 6959-A §2.

254. See, e.g., Sergio Muñoz Sarmiento, *Interview: On Deaccessioning with Richard Brodsky*, DEACCESSIONING BLOG (June 16, 2009, 7:51 PM), <http://clanco-theartdeaccessioningblog.blogspot.com/2009/06/interview-on-deaccessioning-with.html> ("I'm not sure what the romantic and mystical attachment to the idea that artworks are not market commodities.").

255. See, e.g., Cirigliana, *supra* note 10, at 384–87 (contributing the financial strain museums face today to the history of museums as collectors, and the resulting overcollecting and expense of collections storage); MALARO, LEGAL PRIMER, *supra* note 52, at 216 ("Museums are not mausoleums dedicated to preserving, intact, the accumulation of successive generations.").

256. Assemb. B. 6959-A § 2.

257. See Riley, *supra* note 22 ("Current deaccession guidelines perpetuate a museum culture in which objects are ends in themselves, more important than their use to educate, to inspire, to stimulate, to empower . . . They help create and sustain a climate in which works of art are fetishes."). But see Canaday, *supra* note 63 (stating that art museums are "repositories of precious records," not "merchandise marts nor aesthetic stock exchanges").

258. See Tyler Green, *The Debate over Collection-to-Casino Rentals*, MODERN ART NOTES (Feb. 25, 2009, 11:55 AM), <http://blogs.artinfo.com/modernartnotes/2009/02/the-debate-over-collection-to/> ("We museum directors can huff and puff about how once we bring these artworks into our collections that they no longer have value because they've been removed from the market, . . . that they're held in trust for future generations. It's B.S. We go on and sell them and the rule is the proceeds from the sale can only go to replenish the collection.") (quoting Hugh Davies, Director of the Museum of Contemporary Art San Diego).

259. Assemb. B. 6959-A § 2.

art should be considered a commodity.²⁶⁰ Even when deaccessioning sales proceeds are used for future acquisitions, that sale itself puts the artwork in the market, makes it a commodity, and removes it from the public trust.²⁶¹ Sometimes, even a transfer of artwork to another museum could violate the public trust by taking the artwork away from the public to which it was given in trust.²⁶²

The broader approach to deaccessioning emphasizes the public interest in both the museum collection and the museum itself.²⁶³ A criticism of the restrained approach is that the restrictions on the use of deaccessioning proceeds ignore the need for the museum to survive as an organization and fulfill its social function.²⁶⁴ The three duties of acquiring, preserving, and providing access to works of art form the foundation of the public's trust in museums and the museum's promise to serve the public.²⁶⁵ The public benefits from the museum's decisions on exhibitions, programming, and other opportunities to access art as well as new acquisitions.²⁶⁶ The restrictions of the restrained approach, however, seem to prefer the collecting mission over the cultural education and access missions.²⁶⁷ The Brodsky Bill emphasizes the museum's goal to acquire art without considering how museums provide access to the art in its collection to the public or to researchers.²⁶⁸ The only place the Brodsky Bill mentions the accessibility of the collection is in the definition of a collections management policy.²⁶⁹ The proposed legislation would rather have a museum close and its collection transferred to another community than permit the

260. Fincham, *supra* note 74, at 4.

261. See, e.g., Riley, *supra* note 22 ("But the existing policy is in fact an exercise in smoke and mirrors, providing neither guarantees of public access nor commitments to maintain possession."); Donn Zaretsky, *Meet Mr. Pareto*, THE ART LAW BLOG (Jan. 5, 2009, 11:32 PM), <http://theartlawblog.blogspot.com/2009/01/meet-mr-pareto.html>; cf. Rosenbaum, *For Sale*, *supra* note 15.

262. See Riley, *supra* note 22.

263. See Zaretsky, *supra* note 261 ("Would we really rather see the National Academy—around since 1825—close and its entire, 7,000 work collection sold off than see *two* of those 7,000 works sold?").

264. Fincham, *supra* note 74, at 13 ("[T]he public interest in making these works available to the people must be preserved, but not at the expense of the organizations who provide the stewardship necessary to do so.") (citing *Legislature's Meddling Hurts State's Museums*, ALBANY TIMES UNION, July 5, 2009, at B1).

265. Cuno, *Object of Art Museums*, *supra* note 10, at 52.

266. *Id.*

267. See Assemb. B. 6959-A, 232d Legis. Sess. § 2 (N.Y. 2009); Fincham, *supra* note 74, at 13.

268. Fincham, *supra* note 74, at 13.

269. Assemb. B. 6959-A §2.

use of proceeds from selling art towards other essential museum functions.²⁷⁰ The argument for allowing proceeds to fund operating costs is that it is equally important to support the continued existence of the museum as it is to support the collection the museum has a duty to preserve and exhibit.²⁷¹

Responses to the Brodsky Bill from the museum community illuminate some of the intricacies of deaccessioning.²⁷² One museum leader wrote that legislation on particular rules on deaccessioning would “stifle intellectual freedom and differences of taste and opinion” and “chill institutions’ willingness to make independent decisions that may be questioned as a matter of law.”²⁷³ The Art Law Committee of the New York City Bar Association (Art Law Committee) responded to Assemblyman Brodsky, maintaining that existing corporate governance rules have been sufficient to protect the public interest in deaccessioning and that a blanket restriction on the use of deaccessioning proceeds might not benefit the institutions or the public.²⁷⁴ Furthermore, the Art Law Committee expressed that the Brodsky Bill’s definition of “museum” was overly inclusive, binding institutions that have collections but are not museums in the sense that they do not curate and provide public access to exhibitions.²⁷⁵ Finally, the Art Law Committee noted that the proposed legislation details no penalty for noncompliance.²⁷⁶ Those who argue for broader deaccessioning policies insist that every museum, including their communities and their collections, is unique, and that a uniform bright-line rule limiting the use of deaccessioning sales proceeds is counterproductive.²⁷⁷

270. *Id.*

271. See MALARO, LEGAL PRIMER, *supra* note 52, at 232 (citing the example of the New York State Attorney General allowing the New York Historical Society to use deaccessioning sales proceeds for operating costs so that it would not have to shut down).

272. See Isabel Abislaïman, *Whose Art Is It Anyway? New York Art World Puts Brodsky Bill on Slow Track*, N.Y. COUNTY LAWYER, Mar. 2010, at 13 (“Albany still needs time to grasp the complexities of the New York art world.”).

273. Pogrebin, *Bill to Curb Sales*, *supra* note 156 (quoting Richard Armstrong, the director of the Guggenheim) (internal quotation marks omitted).

274. Letter from New York City Bar Association Committee on Art Law to Assemblyman Brodsky, *supra* note 252.

275. *Id.* (presenting examples such as libraries, private artist’s foundations, and archives).

276. *Id.*

277. Arts groups have said that “the Brodsky bill goes too far in imposing blanket regulations without regard to an organization’s specific collecting policies and financial needs.” Pogrebin, *Bill to Curb Sales*, *supra* note 156.

III. A BALANCED APPROACH TO PRESERVING THE PUBLIC INTEREST IN MUSEUMS

The forty-year-old deaccessioning debate has been renewed with the adoption of permanent Regents Rules and the introduction of the Brodsky Bill.²⁷⁸ Part II described the different approaches taken by museums, courts, and legislators to create and champion deaccessioning policies that have had varying degrees of effectiveness. Every position on deaccessioning and the use of deaccessioning sales proceeds claims to protect the public trust in museums. Part III analyzes whether the approaches studied in Part II adequately protect the public trust.

Even though the professional ethics codes against deaccessioning are longstanding, changing times could call for a revision of museum professional practices, or at least a change of perspective on deaccessioning.²⁷⁹ Part III.A advocates for reviving the trust in museums to develop sound and responsible standards for themselves. Part III.B proposes that museum professional organizations utilize their accreditation and membership programs to enable collaborative compliance of professional codes and to provide an opportunity for review. Part III.C recommends that museums adopt a broader approach to deaccessioning in order to develop standards that value the museum's mission to provide its community access to art as much as the museum's mission to collect and preserve art.

A. Museums Should Lead the Development of Guidelines for Collections Management

First, this Section asserts that museums themselves best understand their role in society. Thus, they should take the lead in articulating the standards that will ensure museums fulfill that role. Second, judicial analysis of deaccessioning is currently not comprehensive enough to address the immediate concerns of the museum field. This Section further finds that state legislation and regulation cannot account for the intricacies of museum operations or for the diversity of museum types.

278. *See supra* Part I.C.3.

279. *See* DeAngelis, *supra* note 171, at 403 (explaining how AAMD justified a revision to its guidelines on acquiring archaeological materials and ancient art by stating "museums evolve their professional practices as the world changes").

1. Museums Know Themselves Best

Although the system of self-regulation through accreditation and professional membership programs is not yet perfect, museums are most capable of dictating how they can serve the public adequately.²⁸⁰ Museums traditionally have operated under their own self- and peer-implemented rules,²⁸¹ and the attempt to control museums through legislative intervention has only shaken the public's confidence in museums.²⁸²

The deaccessioning debate is intricate because of the conception of museums as a public trust juxtaposed against the museum's desire to survive as an organization.²⁸³ The diversity of American museums, each with unique concerns, suggests that museums and professional organizations are most adept at developing a comprehensive collections management policy.²⁸⁴ Museums are complex organizations that owe allegiances to many participants and supporters: a diverse community of visitors and donors; federal, state, and local governments; artists, scholars, trustees, and staff.²⁸⁵ Managing these allegiances is a delicate balancing act that museum leaders encounter each day.²⁸⁶ Therefore, museums should retain their professional discretion to address the unique circumstances of their organization's mission and purpose.²⁸⁷

2. Judicial Analysis Lacks a Comprehensive Approach

Relying on judicial review of deaccessioning decisions does not provide a uniform, comprehensive treatment of the deaccessioning and management issues that museums face today.²⁸⁸ Courts have used different standards and legal doctrines to examine

280. See STEPHEN E. WEIL, *No Museum is an Island*, in BEAUTY AND THE BEASTS: ON MUSEUMS, ART, THE LAW, AND THE MARKET 103, 113 (1983) [hereinafter WEIL, *No Museum*] (“[W]e have not yet finished the task of formulating such comprehensive standards that we can say with confidence to that world out there—to that ever-growing group that asserts that it has standing to question what we do—yes, *there is a proper way to run a museum. And yes, that is how we do it.*”).

281. See *supra* Part I.C.1.

282. See *supra* Parts II.A.3 and II.B.2; see also Abislaïman, *supra* note 272, at 5

283. See *supra* Part I.B.

284. See *supra* Part I.A.

285. Pogrebin, *Bill to Halt Sales*, *supra* note 159 (quoting Matthew Titone, a sponsor of the Brodsky Bill, recognizing that “there are certain issues that are more complex than we anticipated”).

286. See *supra* notes 167–73 and accompanying text.

287. See *supra* notes 167–73 and accompanying text.

288. See *supra* Part II.A.2.

deaccessioning decisions and the use of deaccessioning proceeds, including donor intent, *cy près* and fiduciary duty standards.²⁸⁹ It is also difficult to apply the same principles that are appropriate for other types of non-profit institutions to museums, which have special concerns regarding their stewardship of their collections.²⁹⁰ Likewise, the expense and delay of litigation prohibit individuals from suing museums and create unnecessary additional burdens on museums already under financial strain.²⁹¹

3. *State Regulation and Legislation Do Not Accommodate the Diversity of Museums*

State legislation and regulation can create uniform requirements for collections management,²⁹² but they have not yet established a system of review and penalties or been able to address the different needs of the diverse collecting institutions that the laws and rules encompass.²⁹³ For example, the diversity among organizations falling under the Brodsky Bill's definition of "collecting institution" could result in overbroad and unintended consequences.²⁹⁴ Museums, which are non-profit institutions, are already regulated to an extent by state and federal legislation.²⁹⁵ Still, legislative action is counter-productive because the particular concerns attendant with managing different types of collections, catering exhibitions of the collection to a specific community, and soliciting support from a circle of donors require a deep understanding of the multiplicity of factors that affect museums, all of which museum professionals are best able to articulate.²⁹⁶

289. *See supra* Part I.C.2.

290. *See* WEIL, *Breaches of Trust*, *supra* note 191, at 175 ("Neither the attorneys general nor, for that matter, the courts are well-positioned to" develop standards for appropriate conduct in museum operations, "and there are special aspects to museums—particularly the central role of objects and the obligation to care for them properly—that preclude the wholesale adoption of standards from such cognate institutions as private universities and hospitals.").

291. *See, e.g.*, Kearns, *supra* note 20, at 219–20 (describing how the alumnae of Randolph College were unable to secure a preliminary injunction against the college because they could not raise the funds).

292. *See supra* Part II.A.3.

293. *See supra* Parts II.A.3 and II.B.2.

294. *See supra* notes 272–76 and accompanying text.

295. *See supra* Part I.A.1.

296. *See* WEIL, *Breaches of Trust*, *supra* note 191, at 175–76. ("The imposition of standards by legislative action remains a possibility, and certainly a last resort, but there is widespread doubt that such legislative standards could properly take into account the enormous diversity among American museums. Most desirable would be

State legislators might nevertheless desire to implement some control over museum dealings regarding their collections. In this case, legislation should only go so far as to provide general guidelines and parameters for museum policies and governance. These parameters would require, for instance, that collections management policies address the decision-making process and criteria for acquisitions, deaccessions, disposition, and consequences, without imposing specific restrictions.²⁹⁷ Such state guidelines will create a framework for collections management policies to guide collecting institutions, as opposed to legal restrictions that would constrain the operation of these institutions to the detriment of their public purpose.²⁹⁸ This degree of guidance would cement an already widespread practice across museums and contribute to bolstering the public trust in museums.²⁹⁹ Ultimately, however, museums should devise and implement their own collections management policies, without gratuitous government interference, that allow them to secure the public's trust.

B. Enforcement and Creating an Opportunity for Review

The environment in which museums collect and exhibit is constantly changing and, as a result, the policies and principles that drive their operation will need to adapt to new circumstances.³⁰⁰ With each adaptation, museums will progress towards a set of model standards for achieving their public service.³⁰¹ This Section addresses the mechanisms that museum professional organizations can adopt from the courts and state legislation to overcome current limitations in effectively overseeing the management of museum collections.

Museum professional organizations can utilize their accreditation programs to oversee and review deaccessioning decisions on an indi-

for the museum community—unless and until it proved incapable of doing so—to undertake this task itself.”).

297. The AAM and AAMD restrict the use of deaccessioning proceeds, as do the Regents Rules and Brodsky Bill. *See supra* Parts I.C.1, I.C.3. The AAM and AAMD policies and codes, however, apply to institutions that identify themselves as museums, i.e., institutions dedicated to collecting, preserving, and exhibiting art and other objects for the public. *See supra* Part I.A.2. The Brodsky Bill might be overbroad in its definition of “collecting institutions,” applying to institutions like libraries and arts organizations that do not have the same relationship with their collections as museums. *See* Assemb. B. 6959-A, 232d Legis. Sess. § 2 (N.Y. 2009); *supra* note 275 and accompanying text.

298. *See supra* Parts I.A.2, II.B.2.

299. *See supra* Part I.C.1.

300. *See supra* note 279.

301. *See supra* note 280.

vidual basis.³⁰² For museums to self-regulate effectively, the museum community needs a forum in which to ensure compliance with collections policy requirements and to provide an opportunity to review and resolve violations.³⁰³ The judicial analysis examples show that a case by case evaluation of deaccessioning, or any other significant transaction, is beneficial for museums.³⁰⁴ Applying for and achieving accreditation from the AAM is an intense and rigorous process requiring the applicant museum to report to the AAM on every aspect of its operations and goals.³⁰⁵ The museum receives feedback and implements recommendations from the AAM in order to conform to the requirements of accreditation.³⁰⁶ By maintaining this collaborative relationship with accredited museums, professional organizations have an opportunity to review deaccessioning actions.³⁰⁷ This extended accreditation program can review the overall condition of the museum more consistently than courts and the attorneys general who initiate investigations and bring cases to trial.³⁰⁸ Professional organizations should be advisors to museums, emphasizing preventative measures and working closely with the museum to solve problems, such as dwindling funding, earlier rather than later.³⁰⁹

The National Academy example, although often cited to argue the contrary, demonstrates that professional organizations have the potential to collaborate with museums to ensure compliance with museum standards and work out a plan going forward.³¹⁰ Although the AAMD's immediate sanctions against the National Academy were unprecedented and perhaps unnecessarily punitive,³¹¹ the two parties have since agreed on steps the National Academy can take to revise its approach to promoting and fundraising for the museum, as well as

302. *See supra* note 99 and accompanying text.

303. *See supra* Part II.A.2.

304. *See supra* Parts I.C.2, II.A.2. Additionally, the New York Court of Appeals held that members of voluntary accreditation programs, such as the AAM, are entitled to fair notice and an opportunity to be heard. *See* Marilyn E. Phelan, 2 NON-PROFIT ORGANIZATIONS: LAW AND TAXATION § 18:20, n.2 (discussing *Vanderbilt Museum v. Am. Ass'n of Museums*, 449 N.Y.S.2d 399 (1982)).

305. *See AAM Accreditation Program*, AM. ASS'N OF MUSEUMS, <http://www.aam-us.org/museumresources/accred/> (last visited Feb. 24, 2012).

306. *Id.*

307. *Id.*

308. *See supra* Part I.C.2.

309. *About AAM*, *supra* note 23 (stating that the purpose of AAM is to provide a community where museum professionals can share best practices).

310. *See* Finkel, *supra* note 223.

311. *See supra* note 251.

its approach to deaccessioning.³¹² By establishing an enforcement and review system, professional organization oversight of museum actions can help keep historically and culturally important museums on their feet and continuing to contribute to their communities.³¹³

C. Promoting a New Conception of Deaccessioning That Can Protect the Public's Trust in Museums

Parts III.A and III.B described why self-regulation is ideal for museums and how professional organizations can overcome some of the limitations museums faced recently under self-regulation. Museums must create policies, not only to appease critics of their practices, but also to reflect accurately the practicalities and concerns of individual museums and the museum field as a whole. This Section dismisses the absolute prohibition against deaccessioning and the current restrained approach to deaccessioning as inadequate to addressing the needs of museums. Ultimately, Part III.C advocates adopting an approach to deaccessioning that would allow museums that have no other alternatives to use sales proceeds toward satisfying operating expenses and debt obligations, thereby protecting the public interest in a forum for lifelong learning and sharing cultural knowledge.

1. *An Absolute Prohibition Against Deaccessioning is Inconsistent with Today's Museum*

The desire for an absolute prohibition on deaccessioning is faithful to the public trust concept,³¹⁴ but it ignores the need for museums to continually assess their holdings and maintain relevance to their communities.³¹⁵ An absolute prohibition narrow-mindedly interprets a museum merely as a one-way repository of objects.³¹⁶ The practicalities of maintaining a collection call for a more sustainable policy on deaccessioning and collections management that supports the collecting and exhibition needs of the modern museum.³¹⁷

312. Dobrzynski, *Academic Dilemma*, *supra* note 114; Robin Pogrebin, *A Chastised Museum Returns to Life*, N.Y. TIMES, Apr. 18, 2011, at C1; Robin Pogrebin, *Censured By Museum Association, National Academy Revises Policies*, N.Y. TIMES, Mar. 13, 2009, at C1.

313. *See supra* Parts I.A, II.B. *But cf. supra* note 223.

314. *See supra* Part I.B.1.

315. *See supra* notes 63–67 and accompanying text.

316. *See supra* notes 255–57.

317. *See supra* Parts I.A.2, I.A.3.

2. *The Prevalent Restrained Approach Does Not Adequately Protect the Public Interest in Museums*

The AAM and AAMD may have gone too far in their attempts to protect the public image of museums.³¹⁸ The ethics codes and the restrictions derived therein were implemented to bolster the public image of museums, and to restore public trust in the way museums manage their collections.³¹⁹ In their restrictions against deaccessioning, these professional organizations have imposed an unforgiving rule that has proved difficult to follow and accept.³²⁰ An analysis of AAM and AAMD's policies must keep in mind that the goal of those policies was to "maintain the integrity of our museums in the eyes of the public."³²¹ A conservative stance allows museums to continue a regular practice adequate to cover up present controversies, but it does not necessarily result in effective future protection of the public interest in museums and their collections.³²²

The acute focus of AAM and AAMD policies on the act of removing and selling an object from the collection supports the museum's mission to collect and preserve art for present and future generations.³²³ Yet, the museum also has a mission to exhibit and share its collections with the public.³²⁴ This bright-line position values one mission over the other without considering whether the sale of artwork for operating or capital expenditures could ever be in the public interest.³²⁵

The Fresno Metropolitan case highlights the situations when a restriction against the use of deaccessioning proceeds for debts is ineffective.³²⁶ The AAM awarded the Fresno Metropolitan accreditation

318. *See supra* Part II.A.1.

319. *See* Burgess & Shane, *supra* note 95, at 171–75; Canaday, *supra* note 63; DeAngelis, *supra* note 171, at 399; *supra* Part II.A.1.

320. *See, e.g., supra* note 15 (listing recent examples of museum deaccessions).

321. DeAngelis, *supra* note 171, at 399. *But cf.* MALARO, LEGAL PRIMER, *supra* note 52, at 230 (noting that there is a distinction between law and ethics).

322. *See supra* Part II.A.1.

323. *See supra* Part I.C.1.

324. *See supra* Part I.A.2.

325. *But cf.* Pogrebin, *Bill to Curb Sales*, *supra* note 156 (“[S]elling collections for operating funds or for capital improvements is not in the public interest.”) (quoting James C. Dawson, chairman of the Regents’ Cultural Education Committee).

326. *See* Johnson, *supra* note 7 (reporting that the museum dissolved, auctioned its collection, and used the auction proceeds towards settling its debts). The museum held a local auction for items such as office furniture and science exhibits, as well as artworks from the collection that were too expensive to transport, because of their size and weight. George Hostetter, *Hundreds Attend Auction for Met Museum*

in 2007.³²⁷ As such, the museum should have adhered to the AAM's strict policy against the use of deaccessioning sales proceeds for operating costs and debt.³²⁸ According to an AAM representative, however, the rule does not apply if the museum is in dissolution.³²⁹ Furthermore, "[t]he question of ethics goes out the window" when a museum liquidates its assets and closes its doors permanently.³³⁰ Some members of the community, meanwhile, believed that it was improper to auction the collection at the dissolution of the museum and filed a complaint with the California Attorney General.³³¹ The prohibition on the use of deaccessioning sales proceeds neither supported the Fresno Metropolitan's survival as a civic asset nor as a public trust.

Sensing the public distrust of museums, New York State Board of Regents and New York State legislators followed in the direction of the AAM and AAMD.³³² The Regents Rules and the Brodsky Bill sought to eliminate the illicit monetization of museum collections.³³³ The reaction from the art community shows that formulating what is right and wrong in the museum field is not so easy.³³⁴ Although these state regulations and laws reflect a widespread policy, such rules fail to address the financial dilemmas that museums face, which are at the heart of all deaccessioning scandals.³³⁵

3. *A Broader Approach Allows for a Balanced Treatment of the Museum's Multifaceted Mission*

The museum world can establish forums for assessing deaccessioning sales while also providing recourse to museums on the

Property, FRESNO BEE (Feb. 18, 2010, 10:46 AM), <http://www.fresnobee.com/2010/02/17/1825391/hundreds-attend-auction-for-met.html>.

327. Press Release, AM. ASSOC. OF MUSEUMS, AAM Announces Fourteen Newly Accredited Museums (Sept. 4, 2007), *available at* <http://www.aam-us.org/pressreleases.cfm?mode=list&id=137>.

328. *See supra* Part I.C.1.

329. Johnson, *supra* note 7.

330. *Id.*

331. *State Urged to Investigate Fresno Met Auction*, AGS AND THE CHARITABLE SECTOR: NEWS ARCHIVE (Feb. 16, 2010), http://www.law.columbia.edu/center_program/ag/policy/CharitiesProj/resources/charitiespubl/charitiesnews_1.

332. *See supra* Part I.C.3.

333. Assemb. B. 6959-A, 232d Legis. Sess. § 1 (N.Y. 2009).

334. *See supra* notes 272–77 and accompanying text.

335. *See* Jason R. Goldstein, Note, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 217 (1997).

brink of closing their doors.³³⁶ This Section argues that, in conjunction with an extended accreditation program, museums should adopt a broader approach to deaccessioning. Such an approach to deaccessioning would protect the public's trust in museums and the public trust of museum collections, allowing museums to pursue their mission to collect, preserve, and exhibit their collections.

First, preserving the individual voices of museums is in the public interest.³³⁷ More museums will need to close because of financial hardship and disperse their collections, whether by auction, sale, or transfer.³³⁸ Each time that happens, the public loses a voice and vision that interpreted and shared art and cultural knowledge.³³⁹ With the Folk Art Museum, the collection would have lost some of the qualities that it embodied as an institution dedicated solely to its genre if the collection were dispersed or even moved in entirety into a larger "encyclopedic" museum.³⁴⁰ The Fresno Metropolitan was an important influence on a community that has few museums or other cultural, educational venues.³⁴¹ It targeted young families and Fresno's large Latino and Hmong populations.³⁴² The absence of the museum from the Fresno city landscape will have an adverse effect on the city's cultural life and its civic and quality of life reputation.³⁴³ Thus, policies concerning any aspect of museum operations should give equal primacy to the survival of the museum as an organization.³⁴⁴ In some situations, an object in one museum has special importance in that museum or community that would be lost if it went

336. *See supra* Part III.B.

337. *See supra* Part I.A.

338. *See, e.g.*, Johnson, *supra* note 7; Pogrebin, *Relief and Optimism, supra*, note 4.

339. Nazarov, *supra* note 223 ("The decision to close [the museum] was gut-wrenching, in terms of the ramifications to our community and the embarrassment that we had failed in our stewardship.") (quoting Rick Collette, former chair of the board of trustees at the Bellevue Arts Museum).

340. *See* Pogrebin, *Options Dim for the Museum of Folk Art*, N.Y. TIMES, Aug. 25, 2011, at C1 ("We are so much more than the sum of our collections. We've played a very pivotal role in the development of this field. The contribution in terms of the scholarship would no longer occur [if the museum closed], and that would be a tragedy.") (quoting Folk Art Museum senior curator); Smith, *Museum Teeters, supra* note 2 ("[W]e need a museum of folk art the way we need a museum of modern art, to shine a very strong light on a very important achievement.").

341. Johnson, *supra* note 7.

342. *Id.*

343. *Id.*

344. *See* Smith, *Museum Teeters, supra* note 2 ("City officials need to look at the intact museum and collection as a civic and business asset, as well as a cultural one."); *supra* note 47 and accompanying text.

to another museum.³⁴⁵ Most of the time, however, it would be better to use deaccessioning sales proceeds to endow curatorial or educational staff positions rather than limiting the use to future acquisitions.³⁴⁶

Furthermore, private ownership of art is not as detrimental to the public interest in art as some make it out to be.³⁴⁷ Selling art does not destroy it; it still exists and circulates in the art market and can be available to museums through loans from private owners.³⁴⁸ Many American collectors describe themselves as “merely the temporary custodian[s]” of their collections and are dedicated to donating, lending, and otherwise sharing their collections with museums and the public.³⁴⁹ Selling art to the highest bidder would allow the museum to maximize the funds raised from the deaccession for reinvestment back into the museum.³⁵⁰

It is also apparent that there is a need for policies that address fiscal management of a museum *before* it is in financial straits. When a museum wants to deaccession to raise funds for operating costs, the decision is usually a result of poor fiscal management by the board of trustees of that museum.³⁵¹ One cause of financial troubles is the embarkation on a major capital project. The Folk Art Museum, which did not contemplate selling anything, suffered a devastating setback that left the museum with no cash to continue regular operations.³⁵² The Folk Art Museum is open today because of a pledge from a do-

345. See *supra* note 43 and accompanying text. For an interesting argument for state interest in particular artworks that have deep cultural ties to the local community, see Michelle Orloski, Comment, *Preventing Gross Injury to Local Cultural Patrimony: A Proposal for State Regulation of Deaccessioning*, 81 TEMP. L. REV. 605 (2008).

346. See Riley, *supra* note 22 (suggesting that using proceeds earned from an art sale for a curatorial or educational staff endowment fund would be as beneficial to the collection as putting the proceeds toward future purchases for the collection).

347. See Sax, *supra* note 76, at 68–69 (“Though collectors are by definition acquisitive people and collect for a variety of reasons . . . those who own important works routinely describe themselves as trustees or stewards. Living with great art seems to effect a transformation in attitude and approach.”).

348. See, e.g., *id.* at 66 (recognizing that collectors often loan artworks to museums or at least allow limited access to their collections).

349. *Id.* (internal quotation marks omitted). Sax continues to elaborate that some collectors’ “engagement expanded beyond the private interaction of buying for their own satisfactions to the public stewardship that guides our public museums . . . placing works in museums, lending pictures to exhibitions, and welcoming a constant stream of visitors into [their] home.” *Id.*

350. See *supra* note 230.

351. MALARO, LEGAL PRIMER, *supra* note 52, at 233.

352. See *supra* note 207 and accompanying text.

nor that was sufficient to keep it in operation.³⁵³ The pledge came four weeks after the museum first announced that it would close and disperse its collection.³⁵⁴ The Fresno Metropolitan Museum of Art and Science met a similar fate when unforeseen difficulties in a building project sent the museum deep into debt, forcing the organization to shut down and liquidate.³⁵⁵

Museums all over the country are facing similar financial strain and difficult choices.³⁵⁶ Regulations should focus on these capital projects decisions, not just the desperate search for cash in the art collection.³⁵⁷ Preventative measures aimed at the source of a problem would curtail the outbreaks and deaccessioning dilemmas they cause.³⁵⁸

If donations, traditionally the bulk of museum finances, are not forthcoming, then a museum must consider other ways to produce income.³⁵⁹ Options other than a questionable deaccession sale include promoting gift shop sales, travelling or loan exhibitions, and “blockbuster shows” that are exhibitions that draw on popular appeal.³⁶⁰

353. See Porgrebin, *Relief and Optimism*, *supra* note 4.

354. See *id.*; Taylor, *Considers Closing*, *supra* note 2.

355. See Porgrebin, *Relief and Optimism*, *supra* note 4.

356. *E.g.*, DETROIT SCIENCE CENTER, <http://www.detroitsciencecenter.org/index.htm> (last visited Mar. 1, 2012) (stating that the museum closed on September 26, 2011 due to financial hardship); Steve Bornfeld, *End of State Funding Imperils UNLV's Barrick Museum*, LAS VEGAS REV. J. (Aug. 28, 2011), <http://www.lvrj.com/living/end-of-state-funding-imperils-unlv-s-barrick-museum-128550948.html> (reporting that a Nevada museum closed because of state budget cuts); Cecilia Chan, *Glendale Bead Museum to Close*, AZCENTRAL.COM (Feb. 25, 2011, 12:00 AM), <http://www.azcentral.com/community/glendale/articles/2011/02/25/20110225glendale-bead-museum-closing.html> (reporting the closure of an Arizona museum because donations and grants “dried up”); Judith H. Dobrzynski, *The Final Chapter for Fayetteville Museum*, REAL CLEAR ARTS (Dec. 20, 2011, 4:38 PM), http://www.artsjournal.com/realcleararts/2011/12/final_chapter_fayetteville.html (discussing the closure of a North Carolina museum due to debt and budget cuts).

357. See Fincham, *supra* note 74, at 4 (“Current regulations are targeted at the use of the funds gained from deaccession.”).

358. See WEIL, *No Museum*, *supra* note 280, at 113 (discussing developing standards for museum operations and concluding, “[i]n a legal context, what we must learn to practice is preventative law”).

359. See generally Lowry, *Deontological Approach*, *supra* note 24 (discussing the increasing amount of commercial activities pursued by museums today).

360. See, *e.g.*, Emily Bauman, *To Blockbuster or Not to Blockbuster*, F NEWS MAGAZINE (Apr. 6, 2009), <http://fnewsmagazine.com/2009/04/to-blockbuster-or-not-to-blockbuster/>. Museums will sometimes lend, for a fee, travelling exhibitions or individual objects to other museums that have the appropriate facilities and personnel to handle the art. The museum makes its collection available to other communities. This practice turns into a source of income to museums because the borrowing institution usually covers the transporting, insurance, installation and other costs at-

Yet even these activities are frowned upon because this blatant commercial activity undermines a museum's integrity with respect to its mission.³⁶¹ It seems that a museum draws criticism from any kind of effort to support itself, survive another day, and offer exhibitions and programs to the public.³⁶²

Museums have the power to demonstrate to the public that deaccession is not a breach of the trust that the public has given to museums.³⁶³ While a strict rule on the use of deaccessioning proceeds, currently endorsed by professional organizations, places a well-founded emphasis on protecting the public trust's holding in art, the survival of a museum as a cultural forum for its community warrants equal attention.³⁶⁴ The public interest in having museums, especially ones in smaller cities and ones with a specialized focus,³⁶⁵ is too great to stick steadfastly to a position that leads to museum closures. Through collaborative efforts with museum associations, museums can develop strategies to maintain financial health, find alternative sources of funding, and increase community relevance. If these strategies are ineffective, then museums should have recourse to use their

tendant with mounting the exhibition in addition to the exhibition fee. Judith H. Dobrzynski, *MoMA Sends Its Works to Australia: Why So Silent About It?*, REAL CLEAR ARTS (June 12, 2011, 8:20 PM), http://www.artsjournal.com/realcleararts/2011/06/moma_goes_to_australia.html. Interestingly, museums lacking in extra funds also cannot afford to borrow expensive travelling exhibitions from other museums, and instead there has been an increase in museums exhibiting shows composed solely of works from their own permanent collections. Robin Pogrebin, *With Money Tight, Museums Showcase Their Own Works*, N.Y. TIMES, Apr. 13, 2011, at C1.

361. Some museums have drawn scrutiny because they extended these opportunities to for-profit organizations. Not only are they using their collection as a profit-producing asset, but also they are allowing corporations like hotels and casinos to use their public trust assets to make a profit for themselves. Green, *supra* note 258.

362. See Dobrzynski, *supra* note 360 ("Museums have to raise money, and whatever they do—name galleries for donors, raise admission prices, deaccession art, you name it—yields criticism nowadays.").

363. See *supra* Part I.B.2 (discussing how museums maintain the public trust by establishing their authority to carry out their missions for the benefit of the public); see also Lowry, *Deontological Approach*, *supra* note 24, at 143 ("For insofar as public trust means retaining the confidence of the public, museums must be perceived to be acting both responsibly and for the common good. This requires that art museums—at a minimum—inspire confidence in the public that they have made considered judgments about what works of art to collect or to borrow, about how those objects should be displayed and for what purpose, and about what exhibitions and programs to present.").

364. See *supra* Parts I.A.2, I.A.3.

365. See, e.g., examples cited *supra* notes 341–41, 356 and accompanying text (discussing, for example, the Fresno Metropolitan, Fayetteville Museum of Art, Folk Art Museum, and Glendale Bead Museum).

2012]

IN MUSEUMS WE TRUST

901

collections as a financial, as well as cultural, resource in order to continue pursuing their missions.

CONCLUSION

Deaccessioning concerns go to the core of the mission of museums. The reputation of museums in the eyes of the public is at stake, and museums must retain control of the public's expectations of their role in society. The current focus on collections management policies overlooks the cause of museums' recent financial problems, however. The museum field, the public trust, and the public's trust in museums will benefit from a broader view not only on deaccessioning, but also on the scope of self-regulation. Museums have a special relationship with their collections because the objects they collect have both cultural and monetary value. Though abstract and idealistic notions of sacred trust and cultural knowledge drive their missions, museums exist within the reality of our economic world.³⁶⁶ Accordingly, museums must have respected and enforceable policies that address their core mission, as well as their organizational and financial health.

366. *But cf.* WEIL, *No Museum*, *supra* note 280, at 104 (describing how museums are not immune to the events of the outside world).